Supreme Court, U.S.
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# Supreme Court of the United States

LASALLE GROUP INCORPORATED,
*Petitioner*,

v.

TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS,
*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does the alter ego doctrine prohibit a finding that prior employer LaSalle Group, Inc., a non-union construction company that properly terminated a collective bargaining agreement negotiated under §8(f) of the National Labor Relations Act, 29 U.S.C. 158(f), can be held to all the provisions of subsequent employer Industrial Contracting, LLC's collective bargaining agreement executed after LaSalle terminated, absent evidence that nonunion LaSalle was a disguised continuance of union Industrial?

## PARTIES TO PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings are set forth in the case caption. Petitioner, LaSalle Group, Inc., states that it is a privately held corporation. No publicly held company owns 10% or more of LaSalle's stock. *See* Rule 29.6.

Respondents, Trustees of the Detroit Carpenters Fringe Benefit Funds, were plaintiffs-appellants/cross-appellees below. Industrial Contracting, L.L.C., which was a defendant in the district court and an appellee/cross-appellant below, is not a party to this appeal.

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The opinion of the United States Court of Appeals for the Sixth Circuit is reproduced at App. 1a. The Sixth Circuit's order denying the petition for rehearing and for rehearing en banc is reproduced at App 33a. The opinion of the United States District Court for the Eastern District of Michigan is reproduced at App. 24a.

## JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its order denying the Petitioner's rehearing petition on November 12, 2009. The Petitioner timely filed this petition and invokes this Court's jurisdiction under 28 U.S.C. §1254(1)(1988).

## RELEVANT STATUTORY PROVISIONS INVOLVED

29 U.S.C. §158(f) (1974) (reproduced at App. 35a)

29 U.S.C. §159(a) (1959) (reproduced at App. 36a)

29 U.S.C. §186 (1995) (reproduced at App. 37a)

## STATEMENT OF THE CASE

Petitioner LaSalle Group, Inc. ("LaSalle") is a general contractor that was incorporated in 1990. App. 4a. LaSalle entered into a collective bargaining agreement ("CBA") pursuant to §8(f) of the National Labor Relations Act, 29 U.S.C. 158(f), with the Michigan Regional Council of Carpenters ("MRCC" or "Union"). LaSalle subsequently provided its notice of

termination of the CBA on February 27, 2003. RE.37-3:p.1; RE.42-11:p.6; RE.42-21:p.5. LaSalle lawfully terminated this CBA effective May 31, 2003. App. 25a. LaSalle had no obligation to pay fringe benefits to the Funds after May 31, 2003. Once LaSalle terminated its CBA, it laid off all its union carpenters.

On August 21, 2001, Industrial Contracting, L.L.C. ("Industrial"), was incorporated. App. 25a. On June 1, 2003, Industrial entered into a CBA with the Union. App. 25a. Industrial then hired most of LaSalle's laid off carpenters. Carpentry subcontractor Industrial has never been a general (or primary) contractor. RE.42-21:p.22. Industrial's CBA is still in effect. App. 25a.

As a general contractor, LaSalle did not have any carpenters on its payroll after it terminated its CBA. RE.42-11:p.5 of 13. Instead, it hired nonunion carpentry subcontractors to perform carpentry work on projects. RE.42-11:p.4 of 13. Those nonunion companies necessarily had nonunion carpenters as employees. It is these nonunion employees of LaSalle's nonunion carpentry subcontractors for whom the Funds are seeking fringe benefit payments. App. 26a.

After LaSalle properly terminated its CBA and Industrial became a signatory, the Funds audited both LaSalle and Industrial to determine whether they properly paid all the fringe benefits required under their respective CBAs. RE.43-33:p.4. These audits confirmed that (1) LaSalle paid all required fringe benefit contributions while it was a signatory to the CBA, and (2) since becoming a signatory, Industrial also paid all required fringe benefit contributions. RE.37-7:p.1; RE.37-8:p.1; RE.37-9:p.2; RE.37-10:p.2; RE.43-33:pp.9-10. The Funds do not claim that LaSalle

owes fringe benefits for any of LaSalle's employees. App. 26a. The Funds also do not claim that LaSalle violated the subcontracting provision of the CBA that it properly terminated. Instead, the Funds claim that LaSalle is bound to Industrial's CBA and that LaSalle must therefore pay the Funds fringe benefits for nonunion LaSalle's subcontractors' nonunion employees. App. 26a.

## REASONS FOR GRANTING THE PETITION

### I. The Circuits do not assess alter ego under the "disguised continuance" test set forth by this Court in *Southport Petroleum* and *Howard Johnson*.

It is well-settled that an employer can avoid a union contract by shutting down its operations entirely. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 273-4 (1965). The alter ego doctrine was developed to prevent employers from evading collective bargaining agreements and labor law obligations by making "a mere technical change in the structure or identity of the employing entity ... without any substantial change in its ownership or management." *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 259 n. 5 (1974). This Court first considered an alter ego case in *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942), where an employer sought dismissal of an NLRB order to reinstate union employees because the employer had sold its assets to a second company. The Court found that the NLRB needed to adduce whether there was a "bona fide discontinuance and a true change in ownership – which would terminate the duty of reinstatement created by the Board's order – or merely

a disguised continuance of the old employer." *Id.* at 106. Such a "disguise" was defined as "a disguise intended to evade" the Board's order. *Id.*

In *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957), this Court held that §301 of the LMRA authorized the federal courts to develop a federal common law regarding enforcement of CBAs. But seventeen years later, it cautioned:

> *Lincoln Mills* did not envision any freewheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements. Rather, *Lincoln Mills* makes clear that this federal common law must be "fashion(ed) from the policy of our national labor laws."

*Howard Johnson,* 417 U.S. at 254 (quoting *Lincoln Mills,* 353 U.S. at 456). The Court outlined the major policy of the labor laws in *John Wiley & Sons v. Livingston,* 376 U.S. 543, 549 (1964): "the need to afford some protection to the interests of the employees during a change of corporate ownership."

The union employees' interests were fully served here before LaSalle was declared to be Industrial's alter ego. LaSalle laid off its union carpentry employees on May 31, 2003, when its NLRA §8(f) union contract properly terminated, and Industrial hired many of those same union carpenters after it signed its own §8(f) CBA on June 1, 2003. No one disputed that LaSalle was entitled to terminate its contract. If Industrial had not signed a CBA, it would not have hired the laid-off carpenters, and the pension fund would be worse off. LaSalle certainly is not a

"disguised continuance" of Industrial; instead, it is merely a prior employer of union carpenters that properly terminated its CBA and laid off its carpenters. Declaring LaSalle to be Industrial's alter ego was improper.

Courts have declined to find that a prior employer that properly terminates its union contract is the alter ego of the union company that hires much of its workforce and agrees to be bound to a CBA. *Cement Masons' Pension Trust Fund-Detroit & Vicinity v. O'Reilly,* 664 F. Supp. 277 (E.D. Mich. 1987) (noting that no case was cited where liability was imposed upon a predecessor under an alter ego theory for a successor's labor obligations). *See also Sheet Metal Workers Int'l Ass'n Local Union No. 67 v. Todd-Ford Mgt. Co.*, No. SA-CA-290-XR, 2006 WL 1044240 (W.D. Tex. Mar. 9, 2006) (court refused to find that prior employer, which properly terminated its labor contract, was subsequent employer's alter ego).

There is no reason to seek alter ego status of a prior employer for an on-going business entity's labor obligations. In denying that a nonunion corporation was merely a "disguised continuance" of two union corporations, this Court found significant in *Howard Johnson* the fact that the union corporations continued as viable entities with substantial retained assets sufficient to permit the union to "have a realistic remedy to enforce their contractual obligations." *Howard Johnson,* 417 U.S. at 257. In the instant matter, Industrial is an on-going business employing a number of union carpenters on union jobs for which it pays union fringe benefits. It has not subcontracted work to LaSalle. If the Funds have any viable claims against union signatory Industrial, they can sue

Industrial for breach of contract. But in fact the Funds have overreached, claiming entitlement to union fringe benefits for nonunion LaSalle's nonunion carpentry subcontractors' nonunion employees. The alter ego doctrine was not intended to permit such a perversion of the labor law, which will not benefit any employee (union or nonunion), but instead will simply fill the coffers of the Funds with money they are not entitled to and money which by law they can neither hold onto nor pay out to nonunion carpenters.[1]

Thus, under the reasoning of this Court's decisions in *Southport* and *Howard Johnson*, the alter ego doctrine was meant to apply when a successor corporation is set up to evade a predecessor's labor and collective bargaining agreement obligations. These two decisions require a transfer of assets or ownership from a union company with an existing labor obligation to a nonunion company with no such obligation in order for the union company to unlawfully evade its labor obligation. The point is to protect the rights of the workers. Therefore, if the first company has no labor obligations (i.e., it is nonunion), no "successor" can be held liable for any evasion, as nothing could be evaded. Thus, the "disguised continuance" test necessarily requires first that an obligation exist under the labor laws, and second that the obligation be evaded illegally. No court would hold two nonunion companies that never had any labor obligations to be alter egos for purposes of the national

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[1] Under the Labor-Management Relations Act, 29 U.S.C. §186 (1995), and *Walsh v. Schlecht*, 429 U.S. 401 (1977), the Funds are prohibited from collecting fringe benefit payments on behalf of or for the benefit of unrepresented nonunion employees of nonunion subcontractors of nonunion LaSalle Group, Inc.

labor laws. If nothing is unlawfully evaded, no successor could be responsible under an alter ego theory.

Since these two decisions, however, federal courts around the country have developed a number of different ways to analyze whether in fact a nonunion entity is the "alter ego" of a union entity. At present, most courts disregard the definition that this Court set forth in 1942 that an improper transaction is "a disguise intended to evade" labor obligations, claiming that this Court did not really mean precisely what it said. As a result, the Circuits are all over the board as to whether a pension fund can establish alter ego liability absent proof of (1) unlawful evasion of existing union obligations, or (2) the fund or union's loss of the full benefit of the labor agreement it negotiated. Indeed, in the case at issue here, the Sixth Circuit found the *prior* employer responsible for the collective bargaining agreement of the *successor* employer.

Many circuits start with the NLRB's seven-factor alter ego test that analyzes "whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership." *Goodman Piping Prods., Inc. v. NLRB,* 741 F.2d 10, 11 (2d Cir. 1984); *Trafford Distrib. Ctr. v. NLRB,* 478 F.3d 172, 176 (3rd Cir.), *cert. denied,* 552 U.S. 818 (2007) (considers "equipment and premises" as one prong); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.,* 690 F.2d 489, 507 (5th Cir. 1982), *cert. denied,* 464 U.S. 932 (1983); *NLRB v. Allcoast Transfer, Inc.,* 780 F.2d 576, 579 (6th Cir. 1986); *Iowa Express Distrib., Inc. v. NLRB,* 739 F.2d 1305, 1310 (8th Cir.), *cert. denied,* 469 U.S. 1088 (1984); *Board of Trustees v. Universal Enters., Inc.,* 751

F.2d 1177, 1184 (11th Cir. 1985); and *Fugazy Continental Corp. v. NLRB,* 725 F.2d 1416, 1419 (D.C. Cir. 1984). However, the NLRB developed its alter ego test to evaluate who is an "employer" for purposes of NLRA unfair labor practice claims. *Stardyne, Inc. v. NLRB,* 41 F.3d 141, 147-8 (3d Cir. 1994). Even the NLRB does not require a successor employer to assume a predecessor's CBA, as courts routinely do in pension fund collection actions that allege alter ego. *NLRB v. Burns Int'l Sec. Servs.,* 406 U.S. 272, 281-4 (1972). As shown below, the Circuits using the NLRB's test end up with inconsistent alter ego findings to those that would be obtained concerning the same two employers in an unfair labor practice claim before the NLRB.

The Circuits that use the NLRB test as a proxy for determining alter ego in pension fund cases do not distinguish between the reasoning set forth in suits brought concerning NLRB alter ego findings and pension fund lawsuits seeking fringe benefits. *See Stardyne v. NLRB,* 41 F.3d 141, 147 n. 4 (3d Cir. 1994) (outlining various approaches to alter ego). These courts ignore this Court's holding that the test they are to use is to determine whether there has been a disguised continuance or an improper transfer resulting in unlawful evasion of a valid CBA. Instead, the courts blindly determine alter ego status based on whether some factors were met, but forget that their goal is to determine whether there was a disguised continuance or unlawful evasion. As a result, absurd outcomes such as the instant case occur, where a court's mechanical application of the NLRB test results in a finding that a prior employer that properly terminated its CBA is an alter ego bound to a successor employer's CBA.

### A. Many Circuits use variations of the NLRB's seven-factor alter ego test.

The NLRB first enunciated the seven-factor alter ego doctrine in *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). This doctrine was established for cases originating before the NLRB pursuant to its agency power to administer a congressionally created program. *See Chevron, USA, Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 843-44 (1984). In assessing the question of alter ego, courts in several Circuits routinely follow the NLRB's alter ego standard, ignoring the distinction between NLRB enforcement actions and pension fund collection lawsuits seeking fringe benefits under a CBA. This distinction is important. The NLRB does not consider whether one entity is liable for pension fund contributions under a CBA signed by another entity; indeed, while it may find that a successor company has a duty to arbitrate labor disputes, the NLRB never imposes upon the alter ego the identical contract that only the predecessor executed. *Burns Int'l Sec. Servs.*, 406 U.S. at 281-4.

The NLRB alter ego standard for determining whether two entities should be considered one for purposes of unfair labor practices or the duty to arbitrate with a union has little correlation with the Circuits' alter ego standard for determining whether a pension fund can collect fringe benefits for nonunion workers of a nonunion entity that has ties to a union entity. Courts in pension fund lawsuits are not required to follow the NLRB's alter ego test, nor should they. Because the current seven-factor test used in many Circuits never actually analyzes the "disguised continuance" requirement set forth by this Court in *Howard Johnson Co. v. Detroit Local Joint*

*Exec. Bd.*, 417 U.S. 249, 259 n. 5 (1974), it should be rejected and a better, more predictable test for alter ego liability should be set forth by this Court.

This issue is distinct from this Court's admonition in *Howard Johnson* that it would be improper to have separate substantive law applicable in the NLRB and the courts when unions pursue employers for unfair labor practices. *Howard Johnson,* 417 U.S. at 256. Pension funds seek collection of unpaid fringe benefits from alleged alter egos in federal court, not through arbitration before the NLRB. *See Schneider Moving & Storage Co. v. Robbins,* 466 U.S. 364 (1984). Even the NLRB is prohibited from declaring a successor corporation to be bound to a CBA negotiated by its predecessor, even if the two entities are found to be alter egos. *Burns Int'l Sec. Servs.*, 406 U.S. at 281-4. Pension funds should not be permitted to impose more stringent penalties in retrospect on work already performed in order to recover fringe benefits.

Several circuits that use the seven-factor test then require something more before declaring a nonunion entity to be the alter ego of a union entity. The major division among these Circuits is that some require proof that labor obligations were unlawfully evaded or that the union got less than it bargained for before imposing alter ego liability. Others require proof of intent to evade labor obligations. Proof that obligations were unlawfully evaded should be the critical inquiry before imposing the equitable alter ego doctrine, which would ensure that pension funds and unions obtain all benefits from CBAs to which they are entitled.

The Second Circuit follows the seven-factor test, recognizing that the test is flexible. *Goodman Piping Prods., Inc. v. NLRB,* 741 F.2d 10, 11 (2d Cir. 1984). Proof of intent to evade union obligations or anti-union animus is not required. *Id.* at 12. The Third Circuit also starts with the seven-factor test and considers "intent to evade" as an additional factor to consider. *Stardyne v. NLRB,* 41 F.3d 141 (3d Cir. 1994). However, as in the Second Circuit, a lack of intent to evade does not preclude an alter ego finding. *Id. See also Trafford Distrib. Ctr. v. NLRB,* 478 F.3d 172 (3d Cir. 2007).

The Fifth Circuit uses the seven-factor test and considers the focus of the alter ego doctrine to be on the "disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations." *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.,* 690 F.2d 489, 508 (5th Cir. 1982). However, lower courts in the Fifth Circuit interpret *Pratt-Farnsworth* not as written, but as a holding that "the motive factor, though not controlling, must be given substantial weight in the alter ego determination." *Sheet Metal Workers Int'l Ass'n Local Union No. 67 v. Todd-Ford Mgt. Co.,* No. SA-03-CA-290-XR, 2006 WL 1044240, at *2 (W.D. Tex. Mar. 9, 2006). The *Todd-Ford* court found that unlawful motive is an eighth factor. *Id.* at *15.

The Eighth Circuit starts with the seven-factor test and then requires an inquiry into unlawful motive or intent to avoid a labor contract. *Iowa Express Distrib., Inc. v. NLRB,* 739 F.2d 1305, 1310-11 (8th Cir. 1984); *Crest Tankers, Inc. v. National Maritime Union,* 796 F.2d 234, 237 (8th Cir. 1986). The

Eleventh Circuit simply uses the NLRB's seven-factor test to assess alter ego. *Board of Trustees v. Universal Enters., Inc.*, 751 F.2d 1177 (11th Cir. 1985).

In *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416, 1419 (D.C. Cir. 1984), the D.C. Circuit used the seven-factor test to uphold an NLRB alter ego decision and noted that the Board gives substantial weight to evidence that the motive for the transaction was to evade duties under the labor laws. In that case, the employer undertook a "ferocious anti-union campaign" to prevent employees from voting for the Union. But in *Flynn v. R.C. Tile*, 353 F.3d 953, 958 (D.C. Cir. 2004), the court only considered similarities in ownership, management, business purpose, operations, equipment and customers, noting that no single factor was controlling and all were not required to find alter ego liability. It further held that the absence of anti-union animus did not establish that the two entities were not alter egos. *Id.* at 960. Two years later, a D.C. district court refused to find alter ego liability absent evidence of inequity, holding that a nonunion company is not an alter ego of a union company "when its unionized counterpart discloses the relationship between the two entities prior to entering into a collective bargaining agreement with the union and the union receives the full benefit of that agreement." *Flynn v. Interior Finishes, Inc.*, 425 F. Supp. 2d 38, 54 (D.D.C. 2006).

### B. Other Circuits have developed their own tests for alter ego.

Courts in the First, Fourth, Seventh and Ninth Circuits do not use the NLRB rule. However, they also struggle with adherence to the "disguised continuance"

rule. Because the Circuits are largely ignoring this Court's "disguised continuance" test, LaSalle's Petition for Writ of Certiorari should be granted so that this Court can rein in the Circuits and provide the uniformity that is so lacking in this important area of federal labor law.

### 1. The First Circuit limits alter ego to cases where equity requires it.

In the First Circuit, proof of illicit intent to avoid labor obligations is a "critical inquiry" in some alter ego cases, *see Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 24 (1st Cir.), *cert. denied*, 464 U.S. 892 (1983), but is merely another factor to consider on other cases (*see Massachusetts Carpenters Central Coll. Agency v. Belmont Concrete Corp.*, 139 F.3d 304, 309 (1st Cir. 1998) (anti-union animus is not essential to sustain a finding of alter ego). So sometimes the First Circuit requires proof of unlawful motive, union animus or intent to evade, *C.E.K. Indus. Mech. Contractors, Inc. v. NLRB*, 921 F.2d 350, 355 (1st Cir. 1990), and sometimes it does not, *NLRB v. Hospital San Rafael, Inc.*, 42 F.3d 45 (1st Cir. 1994), *cert. denied*, 516 U.S. 927 (1995). However, it limits the alter ego doctrine to those cases where equity needs to be performed, such as where the corporate shield would prevent a party from receiving what is otherwise due to it from those who created the shield. *Massachusetts Carpenters Cent. Coll. Agency v. A.A. Bldg. Erectors, Inc.*, 343 F.3d 18, 21-22 (1st Cir. 2003). The First Circuit denies recovery to pension funds when no corporate change causes the union to be in a worse position than it was prior to the change. *Id.* at 22.

### 2. The Fourth Circuit considers the "reasonably foreseeable benefit" resulting from the transaction.

The Fourth Circuit takes an approach directly from this Court's pronouncements. It uses a "reasonably foreseeable benefit" standard, which focuses on "whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations." *Alkire v. NLRB,* 716 F.2d 1014, 1019-20 (4th Cir. 1983). The Fourth Circuit derived its test directly from this Court's holding in *Textile Workers v. Darlington Mfg. Co.,* 380 U.S. 263 (1965), explaining that the *Darlington* Court's distinction between the complete closing of a business (which is permissible under the labor laws) and a partial closing (in which the employer remains a viable entity elsewhere) was "the potential for a reasonably expected benefit resulting from the impact of the closing on the employer's remaining labor situation." *Alkire,* 716 F.2d at 1020. Alter ego will be found if "the employer obtains an economic benefit at the expense of statutory employee rights." *Id.* at 1021. Imposition of alter ego status is not dependent upon proof of intent to evade the labor laws, although proof of such an intent will usually establish that the transfer resulted in a reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations. *NLRB v. McAllister Bros., Inc.,* 819 F.2d 439, 445 n. 14 (4th Cir. 1987).

### 3. The Seventh and Ninth Circuits require proof of unlawful evasion of labor obligations.

The Seventh Circuit takes a reasoned approach that requires proof of unlawful evasion before assessing alter ego liability. In *Trustees of the Pension, Welfare & Vacation Fringe Benefit Funds v. Favia Elec. Co.*, 995 F.2d 785 (7th Cir. 1993), the Seventh Circuit explained that the alter ego doctrine requires an examination of (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership, plus a finding that (5) the second company is a "disguised continuance" of the union employer, resulting in evasion of the employer's labor obligations. *Id.* at 788. Although the first four elements are not required in all cases, proof of unlawful motive or intent is critical in the Seventh Circuit. *Id.* at 787.

Courts in the Ninth Circuit begin with a four factor test and evaluate whether two firms have (1) centralized control of labor relations, (2) common management, (3) interrelation of operations, and (4) common ownership and financial control," *J.M. Tanaka Constr., Inc. v. NLRB*, 675 F.2d 1029, 1033 (9th Cir. 1982), and then evaluate whether the nonunion entity was being used "in a sham effort to avoid collective bargaining obligations ... rather than for the pursuit of legitimate business objectives untainted by 'union animus.'" *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1470 (9th Cir.), *cert. denied*, 516 U.S. 912 (1995) (citations omitted).

Absent evidence that a sham transaction or technical change in operations was an attempt to avoid

the union company's labor obligations, or that management later used the nonunion company to avoid the union company's obligations by deliberately shifting all of the union signatory's work to the non-signatory, alter ego liability will not be assessed. *Operating Engs. Pension Trust v. Petelski,* 247 Fed. Appx. 862, 864 (9th Cir. 2007).

**4. The Tenth Circuit has no hard and fast alter ego rule.**

The Tenth Circuit has declared that there is no hard and fast rule for determining whether a second employer is a prior employer's alter ego. *NLRB v. Tricor Prods., Inc.,* 636 F.2d 266, 270 (10th Cir. 1980). In that case, the Tenth Circuit did not set forth a test, but instead agreed with the NLRB's alter ego finding based on anti-union sentiment, continuity of the workforce, relationship between the management of the old and new companies, continuity of equipment and location, the new company's retention of accounts and customers, changes in the type and amount of work performed, and the new company's assumption of the old company's liabilities. *Id.* at 270.

While each Circuit has different alter ego standards and tests and none follows this Court's rulings, they have one thing in common. Applied properly, none of these Circuits would find a predecessor employer responsible for a successor employer's CBA. Each Circuit's focus is in determining whether the nonunion successor is the alter ego of a union predecessor. Other than the Sixth Circuit below, no case could be found where a prior employer was found to be an alter ego of a successor employer. As the successor is a

union company, nothing could be evaded by a predecessor.

### C. The labor laws are applied inconsistently by all Circuits.

Because the circuits use a wide range of tests, disregard this Court's pronouncements concerning "disguised continuance," and ignore the critical question of whether any labor obligations were unlawfully avoided before imposing alter ego liability upon a nonunion company, the federal labor laws are not being enforced consistently across the country. Alter ego liability largely depends on what Circuit the employer happens to do business inside. Indeed, if the facts of the instant case were analyzed in the First, Fourth, Fifth, Seventh, Eighth, Ninth or D.C. Circuit, no alter ego liability would have been assessed. As such, this Court should grant this Petition for Writ of Certiorari to address this critical question and provide guidance to all the courts to develop consistency in the national labor laws.

In addition to the variety of tests used, courts do not know how they are to balance the factors that they are considering. Many courts using either four-factor or seven-factor tests have pronounced that all factors do not need to be present and none are controlling. *Trafford Distrib. Ctr. v. NLRB,* 478 F.3d 172 (3d Cir. 2007); *NLRB v. Allcoast Transfer, Inc.,* 780 F.2d 576, 582 (6th Cir. 1986); *Trustees of the Pension, Welfare & Vacation Fringe Benefit Funds v. Favia Elec. Co.,* 995 F.2d 785 (7th Cir. 1993), *J.M. Tanaka Constr., Inc. v. NLRB,* 675 F.2d 1029, 1033 (9th Cir. 1982); *Flynn v. R.C. Tile,* 353 F.3d 953, 958 (D.C. Cir. 2004).

Some courts claim in *dicta* that proof of intent to evade is not required, but then find such intent, making it impossible to predict whether a lack of intent to evade will preclude alter ego liability. As a result, courts reading each other's opinions are confused as to what is required to establish alter ego. For example, in *NLRB v. Scott Printing Corp.* 612 F.2d 783, 787 (3d Cir. 1979), the court did not decide whether intent to evade was required, but found that it occurred. But in *Alkire v. NLRB*, 716 F.2d 1014, 1019 (4th Cir. 1983), the Fourth Circuit concluded that in *Scott Printing Co.*, 612 F.2d 783, the Third Circuit limited the alter ego doctrine to instances of "intentional employer evasiveness." Similarly, the Sixth Circuit noted in *Allcoast Transfer*, 780 F.2d at 581, that intent is relevant but not essential in the Tenth Circuit, citing *NLRB v. Tricor Products, Inc.*, 636 F.2d 266 (10th Cir. 1980). But the *Allcoast* court recognized and disagreed with the First and Eighth Circuit's conclusion that the *Tricor* court found unlawful motive or intent to be critical to alter ego analysis. *Allcoast*, 780 F.2d at 581 n. 6 (citing *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18 (1st Cir. 1983), and *Iowa Express Distrib., Inc. v. NLRB*, 739 F.2d 1305 (8th Cir. 1984)).

Many courts ignore the question of whether the union or pension fund has sustained any harm from the transaction or transfer of assets. In fact, if no fringe benefits were unlawfully evaded, no alter ego liability can result. Absent unlawful evasion, there can be no "disguised continuance" or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations.

## II. Courts must not use alter ego to eliminate the statutory right to terminate a collective bargaining agreement under 29 U.S.C. §158(f).

The Sixth Circuit's opinion eliminates an employer's absolute right to terminate a CBA executed under §8(f) of the National Labor Relations Act. LaSalle's now-terminated CBA was an NLRA §8(f) agreement, and not a §9(a) agreement.

> Section 9(a) of the NLRA requires that a union be selected by a majority of the employees in a bargaining unit before the union has the right to represent the employees in collective bargaining. 29 U.S.C. §159(a). Section 8(f), however, provides an exception for the building and construction industries. In these industries, an employer can enter into a §8(f) collective bargaining agreement with a union that is not supported by a majority of the unit employees. 29 U.S.C. §158(f). A union representative under a §8(f) agreement has fewer statutory rights and obligations than does a union that is party to a §9(a) agreement.

*Hovey Electric, Inc. v. NLRB*, 22 Fed. Appx. 509, 510 (6th Cir. 2001).

> Congress enacted Section 8(f) of the Act in recognition of special conditions that existed in the construction industry. These special conditions included the fact that employers not only needed an assurance that skilled labor would be available but needed a basis for estimating labor costs in bidding on construction contracts. Employees, on the other

> hand, were often denied the benefits of union representation because of the temporary and sporadic nature of their employment.

*International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770, 774 (3d Cir. 1988), *cert denied,* 488 U.S. 889 (1988) (citations omitted). "Even absent an election, upon the contract's expiration, the signatory union will enjoy no majority presumption and either party may repudiate the 8(f) relationship." *James Luterbach Constr. Co.,* 315 NLRB 976, 978 (1994) (emphasis added). Employers with a §8(f) agreement have no obligation to bargain for a successor contract. *Id.* at 979.

Thus, unlike an employer governed by a §9(a) agreement, LaSalle had an absolute right to terminate its CBA. Because LaSalle lawfully exercised this right, it had no reason to attempt to unlawfully evade any labor obligations. In fact, the district court specifically found that there was no evidence of intent to evade. App. 29a. But the Sixth Circuit's decision binds LaSalle to yet another three-year CBA, despite its lawful termination of that agreement. Congress clearly intended to permit construction companies to terminate CBAs under §8(f) of the Act, but the Sixth Circuit refuses to recognize that right. The §8(f) employer can lawfully terminate its CBA without going out of business, even if the §9(a) employer cannot.

## III. Courts must not be permitted to thwart the federal labor laws that permit "double-breasting."

Several circuits have a skeptical view toward "double-breasted operations," which occur where a union company establishes a second, nonunion company performing similar work in the same market with common ownership. *NLRB v. Fullerton Transfer & Storage, Inc.*, 910 F.2d 331, 336 n. 7 (6th Cir. 1990). Some courts, including the Sixth Circuit's opinion below, conclude that double-breasting is evidence of an attempt to evade the labor laws, and therefore is illegal. App. 9a-10a.

However, Congress has considered and expressly rejected amendments to the labor laws to prohibit double-breasting in the construction industry. In 1986, the House passed an amendment to the Construction Industry Labor Law Amendments of 1985, which contained language that would prohibit double-breasting or dual shops in the construction industry. H.R. 281, 99th Cong. (1986). The bill did not pass the Senate. S. 2181, 99th Cong. (1986). Similar language was introduced in the Senate in 1987, but the bill did not proceed from the committee level. S. 492, 100th Cong. (1987). In reference to H.R. 281, Senator Orin Hatch (R. Utah) explained:

> [I]t would eliminate the court sanctioned practice of commonly owned but separately managed construction entities operating without regard to each other's collective bargaining obligations. Known as dual shop operations or double-breasting, this practice normally involves one entity which is unionized

> and one which is non-union. HR 281 would destroy this legal practice.

132 Cong. Rec. S5724-01, 23 (1986).

In rejecting the anti-double-breasting amendment, Congress has indicated that double breasting is legal and does not violate the labor laws. The courts may not impose their judgment concerning what laws should be enacted when Congress has already spoken on an issue and specifically chose what to prohibit. "It is not the appropriate function of the federal courts to rewrite an act of Congress." *United States v. Youngstown Sheet & Tube Co.*, 171 F.2d 103, 111 (6th Cir. 1948). Therefore, to the extent that the Sixth Circuit's holding is based upon its view that double-breasting should be illegal, it cannot stand.

Even assuming that two entities such as LaSalle and Industrial are double-breasting (which they are not), double-breasting is not illegal, and certainly cannot be improper for a §8(f) signatory to the MRCC's CBA. It is inappropriate to impose alter ego liability upon any alleged "double-breasted" entity that terminated a construction industry §8(f) "me too" agreement. The §8(f) employer can choose whether or not to join a union. If it chooses not to remain in the union and lawfully terminates, no law prohibits it from setting up a separate union operation.

## IV. The Sixth Circuit's decision ignores this Court's requirement in *Howard Johnson* and *Southport Petroleum* that a nonunion alter ego be the "disguised continuance" of a union company.

Courts of the Sixth Circuit applying the alter ego doctrine are supposed to examine the circumstances surrounding a change in corporate form to determine "whether the change resulted in a '*bona fide* discontinuance and a true change of ownership' or was merely a 'disguised continuance of the old employer.'" *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 579 (6th Cir. 1986) (quoting *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942)). The factors relevant to a finding of alter ego include "whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership." *Id.* (citations omitted). Courts are to "strike a balance among each of the criteria." *Id.* (citing *Nelson Elec. v. NLRB*, 638 F.2d 965, 968 (6th Cir. 1981)). Until the decision below, courts in the Sixth Circuit also considered whether there was any intent to evade union obligations. *Trustees of the Resilient Floor Decorators Ins. Fund v. A&M Installations, Inc.*, 395 F.3d 244 (6th Cir. 2005). *But see Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006).

### A. The Sixth Circuit keeps shifting its alter ego standard.

In *Allcoast Transfer*, 780 F.2d at 581, the Sixth Circuit used the NLRB's seven-factor test to assess whether the NLRB properly found two entities to be alter egos. In doing so, it proclaimed that it was not

bound by any precedent from this Court or from its own Circuit concerning whether "intent to evade" is a required element for assessing alter ego. *Id.* at 579. Although it rejected employer intent to evade as a requirement for alter ego, it explained that the purpose of the doctrine was to "prevent employers from evading obligations under the Act." *Id.* at 582. Thus, lawful evasion (such as through the proper termination of a §8(f) contract) has never before resulted in alter ego liability.

A district court next considered whether a predecessor employer was responsible for the CBA obligations of a successor in *Cement Masons' Pension Trust Fund v. O'Reilly,* 664 F. Supp. 277 (E.D. Mich. 1987). In noting that "[n]o case has been cited ... where the court, on an alter ego theory, imposed liability on a predecessor ... for the debts of a successor," it also found no proof that the successor was a "disguised continuance" of the predecessor. *Id.* at 280.

Three years later, in *NLRB v. Fullerton Transfer & Storage, Inc.,* 910 F.2d 331 (6th Cir. 1990), the Sixth Circuit refused to apply the NLRB's seven-factor alter ego test to find a union and nonunion company to be alter egos when the split into the two companies occurred long before the NLRB ordered a backpay award at issue. The *Fullerton Transfer* court explained that where no union obligations were avoided at the time that the separation into two entities occurred, no corresponding benefit occurred that would trigger alter ego obligations. *Id.* at 337. It concluded that alter ego would only be applied where a corporation attempts to limit liability by thwarting

labor law obligations. *Id.* at 338. Thus, evasion of labor obligations became relevant in this Circuit.

Following the *Fullerton Transfer* reasoning, the Sixth Circuit expressly adopted the reasoning of the district court in *O'Reilly,* noting that intent to evade labor obligations is the focus of the alter ego doctrine. *Trustees of the Resilient Floor Decorators Ins. Fund v. A&M Installations, Inc.,* 395 F.3d 244, 248 (6th Cir. 2005). In considering whether double-breasted operations are prohibited by the labor laws, the *Resilient Floors* court concluded that where there is no proof that the relationship between the alleged alter egos changed or caused the union to receive less than the full benefit of its CBA, alter ego liability is inappropriate. *Id.* So despite the fact that the two companies worked on many of the same projects, had the same customers, shared office and warehouse space in the same building, shared office equipment and staff, and answered each other's phones and assisted with payroll, they were not alter egos. *Id.* at 246.

But soon afterward, a different panel of the Sixth Circuit found that common ownership or intent to evade federal labor law obligations was not necessary before finding alter ego liability. *Yolton v. El Paso Tennessee Pipeline Co.,* 435 F.3d 571, 588 (6th Cir. 2006). It avoided reaching the same conclusion as the *Fullerton Transfer* case by limiting that case to its facts. *Id.* at 587. Incredibly, even though *Resilient Floors* was decided on January 5, 2005 and *Yolton* was not argued until December 6, 2005, the *Yolton* court made no reference whatsoever to *Resilient Floors.*

Three months after *Yolton*, a district court judge, in following the reasoning of *Resilient Floors*, noted that the Sixth Circuit has "categorically rejected application of the alter ego doctrine ... where a nonunion company establishes a union company and no preexisting labor obligations are disrupted." *Cement Masons' Pension Trust-Fund v. McCarthy*, No. 04-CV-74006-DT, 2006 WL 770444, at *4 (E.D. Mich. Mar. 24, 2006). Because the union company did not conceal its close relationship with the nonunion company, the union did not receive any less than that for which it bargained. *Id.* at *5.

The Sixth Circuit below decided to follow the *Yolton* line of reasoning rather than the prior *Resilient Floors* decision. In fact, it attempted to confine the *Resilient Floors* decision to its facts. App. 13a. The two conflicting lines of reasoning continue to weave their way through the Sixth Circuit because panels in disagreement with prior panel decisions simply limit those cases to their facts, in contravention of Sixth Circuit Administrative Rule 206(c), which states:

> Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court.

6th Cir. R. 206(c). Although the Sixth Circuit appears to be confused as to whether to follow the reasoning of the reported decisions in *Resilient Floors* or *Yolton*, when given the chance to review both of these cases en banc, it declined to do so. It should not be permitted to contravene Rule 206(c) by continually "limiting to the facts" any prior decisions that a panel disagrees with.

Because two conflicting lines of reasoning continue to exist in the Sixth Circuit, this Court should grant this Petition for Writ of Certiorari in order to establish once and for all what the alter ego standard is in the Sixth Circuit and across the country.

### B. Courts of the Sixth Circuit do not apply the alter ego test consistently.

Little guidance exists as to the application of the alter ego test. No court in the Sixth Circuit has specified how much weight to afford each factor, and specifically, what to do when one or more of the factors is not present. Indeed, instead of considering each factor in turn, the Sixth Circuit has declared that "no factor is controlling and all need not be present." *Yolton,* 435 F.3d at 587. Courts need guidance concerning the application of the alter ego doctrine so that they do not simply list those facts that support a finding of alter ego and ignore those facts that mitigate against it. Trial courts should be required to apply the facts to each factor in turn and then determine on balance whether the facts weigh in favor of or against a finding of disguised continuance and thus alter ego.

In the instant matter, however, the Sixth Circuit threw out the seven-factor test and established a new "mountain of evidence of intermingling" standard. Despite no factual findings concerning alter ego in the district court, the Sixth Circuit declared the two entities to be alter egos after improperly reaching its own factual findings that "the record is replete with evidence of entanglement" between the two companies. App. 13a. No court has ever analyzed the facts of this case to determine whether, on balance, the two enterprises have "substantially similar" management,

business purpose, operation, equipment, customers, supervision and ownership. Indeed, if the current decision stands, the new test for alter ego standard in the Sixth Circuit is whether there is a "mountain of evidence establishing the intermingling of the two companies" (App. 8a), with no accompanying analysis of each of the seven factors. Thus, an alter ego finding does not need to be premised on a finding of disguised continuance or sham transfer in this Circuit. Two companies in the Sixth Circuit can now be alter egos by the mere "intermingling of the two companies."

This result puts companies in greater jeopardy of being declared alter egos improperly. If the courts are to balance the seven factors, then any factor that is not present should weigh against a finding of alter ego. Unfortunately, courts in this Circuit find alter ego if a few factors are present, ignoring those factors that mitigate against alter ego status and ignoring the requirement that there be a disguised continuance or some unlawful evasion. As a result, the application of this test is patently unfair to employers, particularly as an employer can be found to be an alter ego of another absent any proof of either (1) intent to evade labor obligations, or (2) unlawful evasion.[2] Unless the courts of this Circuit "strike a balance among each of the criteria," absurd results like the instant case will result. Often no balancing of pro- and anti-alter ego facts is performed. In the instant matter, rather than returning the case to the district court to analyze the seven factors and decide whether, on balance, the two

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[2] It is undisputed that neither LaSalle nor Industrial ever evaded a single dollar of fringe benefits under their respective CBAs while they were union signatories.

entities were alter egos, the Sixth Circuit stepped into the fact-finder's shoes, abandoned the seven-factor test, ignored the lack of unlawful evasion, and found LaSalle to be Industrial's alter ego by fashioning a new alter ego standard based on a "mountain of evidence" of intermingling.

Under this new test, the entities in *Howard Johnson* would be alter egos today. The Sixth Circuit, with its new test, would find that the new ownership (Howard Johnson), which purchased a restaurant and hotel from the union entity and even hired some of the union entity's old employees, was sufficiently intermingled with the old union entity to meet the "mountain of evidence of intermingling" standard In 1974, this Court reversed the Sixth Circuit's finding of alter ego in *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249 (1974). In the intervening 36 years, the Sixth Circuit has been whittling away at this Court's reasoning in *Howard Johnson*, in effect abrogating that decision and blazing its own alter ego test.

### C. The Sixth Circuit improperly imposes alter ego liability even absent "unlawful" evasion of labor obligations.

When the alter ego doctrine was first established in this Circuit, the Sixth Circuit properly recognized that where no union obligations were unlawfully avoided, "there is no corresponding benefit that would trigger alter ego obligations." *Fullerton Transfer*, 910 F.2d at 337. It declined to apply the alter ego doctrine absent proof that any obligations were unlawfully avoided (regardless of intent). In the instant matter, however, it ignored that requirement. It is undisputed that

LaSalle paid all pension obligations while it was a signatory, and that it properly terminated its CBA. Holding it to Industrial's subsequent CBA simply because Industrial hired some of LaSalle's laid off employees is improper.

Instead, the Sixth Circuit should be required to follow the standard set forth by this Court that a nonunion company is an "alter ego" of a union company only if the nonunion company is a "disguised continuance of the old employer," based primarily on a "mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management." *Howard Johnson,* 417 U.S. at 261 n. 5 (citing *Southport Petroleum Co. v. NLRB,* 315 U.S. 100, 106 (1942)). Although courts in this Circuit routinely quote this language from *Howard Johnson,* they do not actually apply it. They mechanically apply the NLRB's seven-factor test but forget to assess whether the nonunion entity is actually a "disguised continuance" of the union entity. They refuse to recognize that lawful evasion (i.e., through proper termination of a CBA) is permissible.

In the past, the Sixth Circuit attempted to follow this Court's pronouncement by also considering whether there was any evasion of preexisting labor obligations. *See Trustees of the Resilient Floor Decorators Ins. Fund v. A&M Installations, Inc.,* 395 F.3d 244 (6th Cir. 2005). In *Resilient Floors,* the Sixth Circuit stated that "'an intent to evade' preexisting obligations is 'clearly the focus of the alter ego doctrine,'" so absent "proof that the union had been short-changed ... by changes in the structure of the two entities involved in the dispute, there could be 'no

inequity that would justify a court's imposition of liability.'" *Id.* at 248 (quoting *Cement Masons' Pension Trust Fund v. O'Reilly*, 664 F. Supp. 277, 279 (E.D. Mich. 1987)).

With the current decision, unlawful evasion and the seven-factor test are no longer requirements in this Circuit. The Sixth Circuit does not consider whether the nonunion company is a "disguised continuance" of the union company "to avoid the effect of the labor laws." *Howard Johnson*, 417 U.S. at 261 n. 5. If the court had analyzed whether nonunion LaSalle was a disguised continuance of union Industrial in order to avoid labor obligations, it could not have concluded that the prior employer LaSalle, which properly terminated its CBA, was the alter ego of the subsequent employer Industrial, which signed its own CBA after LaSalle's CBA terminated. The Union and Funds are not entitled to double-dip and hold both entities liable for Industrial's labor obligations when Industrial is already meeting all of those obligations.

The district court below, following *Resilient Floors*, never reached the seven-factor test, but instead properly found that alter ego was inapplicable because there was no "evidence to show that Industrial was formed or operated with the intended purpose of evading any of LaSalle's preexisting contractual obligations." App. 29a. The district court's decision, which the Sixth Circuit reversed, is consistent with the "disguised continuance" standard.

The Sixth Circuit, however, without any factual support, reversed the question and concluded that prior employer LaSalle was the alter ego of subsequent employer Industrial. But no evidence was ever

presented that unionized Industrial sent any work to nonunion LaSalle or that LaSalle helped Industrial evade any labor obligations, so no evidence supported a finding of "disguised continuance." Instead, Industrial signed its own CBA with the MRCC and then hired LaSalle's laid-off carpenters after LaSalle terminated its CBA with the MRCC and ceased doing carpentry work.

LaSalle and Industrial did precisely what the labor laws require – one entity properly terminated its §8(f) CBA and quit doing carpentry work, and the other entity signed a union contract and hired most of the laid-off carpenters. LaSalle stopped performing carpentry work and had no labor obligations after May 31, 2003. Considering LaSalle (the prior employer of union carpenters) to be the alter ego of Industrial (the current employer of many of those same union carpenters) is the absurdity that results when courts mechanically follow the seven-factor alter ego test without considering the "disguised continuance" issue. Even the Funds agree that LaSalle and Industrial paid all requisite benefits under their respective CBAs. If Industrial had never signed its CBA after LaSalle's proper termination, neither company would have been sued. Industrial's execution of the CBA gave the union more than it was entitled to absent Industrial's signature. Under these circumstances, a finding of alter ego status is improper.

### D. The Sixth Circuit's decision will have a chilling effect on union construction companies.

With the Sixth Circuit's new holding, nonunion companies stand in jeopardy of being found alter egos

of union companies if they sell assets to union companies, if a number of their employees leave to work for union companies, or if they close down a wing of their business and their employees are hired by an entity that later signs a union contract. No labor interest is served by this absurd result. In fact, to the contrary, nonunion companies will have to avoid doing business with union companies in the future (including sending work to union companies) in order to avoid the new "evidence of entanglement" standard. This result thwarts the interest of the labor laws as it discourages nonunion businesses from lawful interactions with union companies. Unions, their members, and pension funds will suffer as a result.

### E. The Sixth Circuit erroneously reached a factual conclusion that prior employer LaSalle was the alter ego of new employer Industrial, even though LaSalle could not be a "disguised continuance" of the successor employer.

The determination of alter ego status is a question of fact that is reversible only if clearly erroneous. *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 579 (6th Cir. 1986). The district court below concluded that alter ego was inapplicable because there was no evidence of any intent to evade preexisting labor obligations, and it never reached any findings of fact concerning alter ego. App. 29a. The Sixth Circuit then improperly took on the role of fact-finder and, based on "the documentary nature of plaintiffs' proof," erroneously concluded that prior employer LaSalle was Industrial's alter ego. App. 13a. A reviewing court is not permitted to "duplicate the role of the lower court" and reach its own findings of fact, "even when the

district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson v. Bessemer City,* 470 U.S. 564, 573 (1985). The Sixth Circuit should have remanded the alter ego fact question to the district court once it decided that intent to evade was no longer a prerequisite to alter ego in this Circuit.

The Sixth Circuit made the erroneous factual finding that LaSalle, the old union employer that properly terminated its CBA, was the alter ego of the new employer Industrial, which did not sign a CBA or hire LaSalle's former employees until after LaSalle terminated. App. 13a-14a. The Funds concede that LaSalle had the right to terminate its NLRA §8(f) CBA with the MRCC and that such termination was proper and effective one day before Industrial's CBA went into effect. RE.45-8:p.3. But an old employer cannot logically be a "disguised continuance" of a new employer. Even if a "change in corporate form" of the union entity could be considered a "disguised continuance of the old employer," *Southport Petroleum Co. v. NLRB,* 315 U.S. 100, 106 (1942), the correct conclusion would have been to find Industrial the alter ego of LaSalle and subject to LaSalle's (now properly terminated) CBA, not vice versa. But because Industrial signed its own CBA and hired many of the same union carpenters, the union and Funds continued to receive all the same benefits they received under LaSalle's properly terminated CBA. They are not entitled to anything further.

## CONCLUSION

For the reasons set forth above, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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## APPENDIX A

*RECOMMENDED FOR FULL-TEXT PUBLICATION*

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**Nos. 08-1457/1994**

**[Filed September 17, 2009]**

TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS,
*Plaintiffs-Appellants / Cross-Appellees,*

*v.*

INDUSTRIAL CONTRACTING, LLC, a Michigan limited liability company, and LASALLE GROUP, INC., a Michigan corporation,
*Defendants-Appellees / Cross-Appellants.*

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 05-71141—John Corbett O'Meara, District Judge.

Argued: March 11, 2009

Decided and Filed: September 17, 2009

Before: BATCHELDER, Chief Judge; DAUGHTREY and MOORE, Circuit Judges.

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## COUNSEL

**ARGUED:** Walter B. Fisher Jr., FILDEW HINKS, PLLC, Detroit, Michigan, for Appellants. Steven A. Wright, STEVEN A. WRIGHT, P.C., Shelby Township, Michigan, for Appellees. **ON BRIEF:** Walter B. Fisher Jr., Charles S. Kennedy, III, FILDEW HINKS, PLLC, Detroit, Michigan, for Appellants. Steven A. Wright, Sandra L. Wright, Patrick J. Carleton, STEVEN A. WRIGHT, P.C., Shelby Township, Michigan, Gene J. Esshaki, ABBOTT NICHOLSON, P.C., Detroit, Michigan, for Appellees.

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## OPINION

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MARTHA CRAIG DAUGHTREY, Circuit Judge. The plaintiffs in this labor dispute are trustees of an association of various benefit funds established under the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. §§ 141-67, 171-97, and the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. §§ 1001 - 1461, and maintained for the benefit of members of the Michigan Regional Council of Carpenters, AFL-CIO (the union). They filed this action against defendants Industrial Contracting, LLC, and LaSalle Group, Inc., claiming that "[f]or all relevant purposes, [the two companies] are one and the same, constituting a single employer, with each being

the alter ego of the other" and seeking to audit the books of both defendants to verify the accuracy of the contributions that they were contractually obligated to make to the plaintiffs under the provisions of the collective bargaining agreement (CBA) between the union and Industrial Contracting.

The district court granted summary judgment in favor of the defendants, based on its determination that, as a matter of law, the "alter ego" doctrine was inapplicable in this case because the plaintiffs had "failed to present any evidence to show that Industrial was formed or operated with the intended purpose of evading any of LaSalle's preexisting contractual obligations." We conclude that this decision cannot be reconciled with our opinion in *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576 (6th Cir. 1986), in which we held that "a finding of employer intent is not essential or prerequisite to imposition of alter ego status. . . . [but] is merely one of the relevant factors which the [courts] can consider." *Id.* at 581. We therefore reverse the district court's judgment and remand the case for further proceedings.

## *FACTUAL AND PROCEDURAL BACKGROUND*

As we noted in *Allcoast Transfer*, "th[e] factors relevant to a finding of alter ego status include 'whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership.'" *Id.* at 579 (quoting *Nelson Electric v. NLRB*, 638 F.2d 965, 968 (6th Cir. 1981)). Our inquiry, then, begins with a review of the evidence, largely undisputed, that was supplied at the summary judgment stage of the litigation. That evidence established that the funds are

beneficiaries of a CBA signed between the Michigan Regional Council of Carpenters and Detroit-area employers in the construction industry. The CBA requires employers to make contributions to the funds on behalf of covered employees, including fringe benefits that are calculated based on either the hours worked by covered employees or a percentage of the employees' base wages. The contract also covers subcontracting ("[n]o employer shall subcontract or assign any of the work described herein which is to be performed at a job site to any contractor, subcontractor or other person or party who fails to agree in writing to comply with the conditions of employment contained in the Agreement") and alter-ego operations. The contract clause covering the latter provides that if "work of the type covered by this Agreement" is performed by any entity, regardless of under what name it is performed,

> wherein the Employer (including its officers, directors, owners, partners, or stockholders) exercises either directly or indirectly (such as through family members) any significant degree of ownership, management, or control, the terms and conditions of this Agreement shall be applicable to all such work and to such successor or alter ego entity.

The controversy arose because of the overlapping establishment and convergence of the defendant companies. LaSalle was incorporated in 1990. Steven Palermo became a minority owner of LaSalle in 1995 and a majority owner approximately five years later. Although LaSalle was a signatory to the CBA with the union at the time Palermo purchased his ownership interest, the company declined to renew the contract

when it expired on June 1, 2003. In the meantime, Steven Palermo and his brother Randy had formed another company in 2001 that was the predecessor to Industrial Contracting, LLC. Three years later, Steven Palermo sold his half-interest in Industrial Contracting to his former brother-in-law, Chester Jablonski, who purchased an additional 1.8 percent interest from Randy Palermo. Industrial Contracting was not a signatory to any CBA until it entered an agreement with the union on June 1, 2003, at the same time that LaSalle terminated its relationship with the union.

In addition to his majority interest in Industrial Contracting, Jablonski was LaSalle's chief financial officer and had previously served as its vice president, secretary, and treasurer. He managed the day-to-day operations for both Industrial Contracting and LaSalle, and he acted as the contact with the union for both companies. Jablonski testified that he had the authority to sign Steven Palermo's signature on LaSalle documents for "pretty much whatever I need his signature on."

According to the LaSalle website as accessed in 2006, the company was a general contractor and construction management company that had a total of 110 field employees, including in-house carpenters and other tradespeople. However, in a deposition taken in September 2003, a LaSalle official said that the company did not hire tradespeople directly at that time and had only ten laborers on its payroll, down from the "40 or 50" workers employed by LaSalle on June 1 of that year, at the termination of its collective bargaining agreement with the union. Industrial Contracting was a subcontractor that provided labor

and supervision for construction projects, also referred to by Jablonski as an "employee leasing company." At the time the lawsuit was filed, Industrial Contracting had never supplied laborers to any company other than LaSalle.

LaSalle and Industrial Contracting shared many of the same supervisory personnel during the relevant period. For example, Matthew Bertrang and Dave Walasek were listed as employees and supervisors at both companies. Dave Walasek, a labor superintendent and union member, worked for LaSalle until "they switched over," when he was notified by Wes Gerecke, the Field Operations Manager for LaSalle, that he would be working for Industrial Contracting. He testified that his job did not change in any way after he went to work for Industrial Contracting and that Wes Gerecke continued to exercise direction over the projects on which he worked. Matthew Bertrang, a carpenter superintendent and union member, worked for LaSalle until the middle of 2003. After LaSalle terminated its collective bargaining agreement, Bertrang testified that he was given the choice of looking for another job or working for Industrial Contracting. Bertrang, too, said that his job did not change when he moved to Industrial Contracting and that his "direct boss" was Wes Gerecke. Gerecke also assigned Bertrang to various projects and procured equipment for him. Gerecke testified that he supervised Industrial Contracting employees and monitored their needs for material, equipment, and manpower on a day-to-day basis.

At the time the dispute arose, Industrial Contracting and LaSalle were housed in the same building and had rental agreements with the same

real estate company, owned by Steven Palermo. LaSalle paid $9500 a month for the building, and Industrial Contracting rented an office in the building for $200 a month. Before 2005, Industrial Contracting employees received reimbursement checks from LaSalle's account and were covered by LaSalle's workers' compensation insurance policy. In addition, LaSalle paid for Industrial Contracting's general liability insurance policy and Industrial Contracting employees continued to use LaSalle's telephone system and LaSalle business cards. Until 2005, Industrial Contracting billed LaSalle only for its wages and direct costs; in 2005 Industrial Contracting began charging a three-percent markup. During the same period, Industrial Contracting did not own its own equipment, but instead used equipment owned by LaSalle, the use of which LaSalle did not track.

Several LaSalle documents in the record refer to Industrial Contracting employees as LaSalle employees. For example, on the "GM Catering Kitchen" job, the daily report lists the superintendent and foreman as LaSalle employees when they were actually employed by Industrial Contracting. Likewise, on a bid for the "GM Hines Theater" project, an Industrial Contracting employee is listed as a LaSalle employee. For the "DCX Walbridge Aldinger" project, LaSalle was placed on an approved list for bids for which only union signatories were eligible, and a Walbridge Aldinger project manager testified that he mistakenly thought that LaSalle was a union signatory. Moreover, LaSalle failed to list Industrial Contracting as a subcontractor on DCX project documents requiring a list of all subcontractors. LaSalle also submitted invoices for work done by Industrial Contracting employees on the DCX project

as "self-perform" work, enabling the company to charge five percent more for work purportedly performed "in house" by LaSalle.

Despite the virtual mountain of evidence establishing the intermingling of the two companies, the district court granted the defendants' motion for summary judgment, holding that, even though the plaintiffs "ha[d] shown most of the similarities between LaSalle and Industrial that were required under *Fullerton*,"[1] the defendants were entitled to prevail as a matter of law simply because the record was devoid of "any evidence to show that Industrial was formed or operated with the intended purpose of evading any of LaSalle's preexisting contractual obligations." The plaintiffs now appeal that ruling and also complain that the district court improperly struck a portion of the brief they filed in response to the defendants' motion for summary judgment, in which they raised an alternative theory of recovery that had not been raised prior to the close of discovery. The defendants have filed a cross-appeal, contending that as prevailing parties below, they should have been awarded costs and attorneys' fees.

The latter two rulings represent an exercise of the district court's discretion, and nothing in the record suggests to us that the court abused its discretion in reaching the decisions that it did. Moreover, in view of the result we reach today, both of these issues have become moot and, therefore, need not be resolved.

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[1] *NLRB v. Fullerton Transfer & Storage Ltd., Inc.*, 910 F.2d 331 (6th Cir. 1990).

## *DISCUSSION*

A district court's grant of summary judgment is reviewed de novo, *see International Union v. Cummins, Inc.*, 434 F.3d 478, 483 (6th Cir. 2006), and is appropriate when there is "no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of Law." FED. R. CIV. P. 56(c). In considering a motion for summary judgment, we must view the inferences to be drawn from the underlying facts in favor of the non-moving party, in this case the plaintiffs. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Questions of fact, including a district court's factual determination that two companies are (or are not) alter egos, are reviewed for clear error. *See Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 587 (6th Cir. 2006).

The alter ego doctrine is an equitable doctrine "developed to prevent employers from evading obligations under the [National Labor Relations] Act merely by changing or altering their corporate form." *Allcoast Transfer*, 780 F.2d at 579. The doctrine operates to bind an employer to a collective bargaining agreement if it is found to be an alter ego of a signatory employer. *See id.* at 582-83. We have addressed alter-ego operations that occur in two factual contexts. The first is when the new entity begins operations but is "'merely a disguised continuance of the old employer.'" *NLRB v. Fullerton Transfer & Storage Ltd., Inc.*, 910 F.2d 331,336 (6th Cir. 1990) (quoting *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942)). The second is what is referred to as a "double-breasted operation," where "two or more coexisting employers performing the

same work are in fact one business, separated only in form." *Fullerton Transfer*, 910 F.2d at 336.

The Sixth Circuit test for determining whether two companies are alter egos has been adopted from the case law of the National Labor Relations Board. We look to see "'whether the two enterprises have substantially identical management, business, purpose, operation, equipment, customers, supervision and ownership.'" *Id.* (quoting *Nelson Elec. v. NLRB*, 638 F.2d 965, 968 (6th Cir. 1981)). In applying these factors, no individual factor is outcome determinative; instead, "all the relevant factors must be considered together." *Allcoast Transfer*, 780 F.2d at 582. Under Sixth Circuit precedents, moreover, an employer's intent to evade the obligations of a collective bargaining contract is merely one of the factors to be considered and is not a prerequisite to the imposition of alter-ego status. *Fullerton Transfer*, 910 F.2d at 337. We came to this conclusion based on our reasoning that "an employer who desired to avoid union obligations might be tempted to circumvent the doctrine by altering the corporation's structure based on some legitimate business reason, retaining essentially the same business, and utilizing the change to escape the unwanted obligations." *Allcoast Transfer*, 780 F.2d at 582; *see also Wilson v. Int'l Bhd. of Teamsters*, 83 F.3d 747, 759 (6th Cir. 1996) ("[C]ommon ownership or an intent to evade federal labor law obligations are not necessary prerequisites to a finding of alter ego status.").

In double-breasting cases, we have confronted two common fact patterns: (1) the "classic" double-breasting operation in which a union contractor creates a second, non-union company, and (2) the

"reverse" double-breasting situation in which a non-union company opens a sister company that becomes a union signatory. A paradigm example of classic double-breasting can be found in *Allcoast Transfer*, in which the respondent, a unionized moving and storage company, formed an ostensibly separate non-union corporation in order to serve as a licensee for a nationwide moving company. *See* 780 F.2d at 578. We upheld the NLRB's determination that the two companies were alter egos because they had substantially "identical management and supervision," the same business purpose, and the same employees and equipment. *See id.* at 582.

An example of reverse double-breasting was involved in *Trustees of the Resilient Floor Decorators Insurance Fund v. A&M Installations, Inc.*, 395 F.3d 244 (6th Cir. 2005). In that case, a former employee of a non-union carpet sales company started a carpet installation company that hired union labor. The companies shared office and warehouse space and secretarial staff, and the president of the installation company was the former brother-in-law of the president of the sales company. *See id.* at 246-47. We found that the two companies were not alter egos, however, on alternative bases: (1) because the non-union carpet sales company had no preexisting labor obligations to evade, (2) because there was no "pervasive intermingling of funds and operations" as found in other alter ego cases, and (3) because the installation company's workers were, in fact, independent contractors and not "employees" under ERISA. *See id.* at 248-49, 251.

In this case, the district court relied upon our observation in *Resilient Floor* that the union had

"disregard[ed] the fact that 'an intent to evade' preexisting obligations is 'clearly the focus of the alter ego doctrine'" and that, in the absence of proof that the union had been short-changed in some manner by changes in the structure of the two entities involved in the dispute, there could be "no inequity that would justify a court's imposition of liability." *Id.* at 248 (quoting *Cement Masons' Pension Trust Fund v. O'Reilly*, 664 F.Supp. 277, 279 (E.D. Mich. 1987)). The district court also relied on an unpublished district court opinion from the Eastern District of Michigan, *Cement Masons' Trust-Fund v. McCarthy*, 2006 WL 770444 (E.D. Mich. 2006), quoting that opinion as holding that the Sixth Circuit has "categorically rejected application of the alter ego doctrine in the . . . situation [in which] . . . a nonunion company establishes a union company and no preexisting labor obligations are disrupted." *Id.* at *4 (quoting *Resilient Floor*).

We conclude that the district court's analysis does not stand up to *de novo* review. The *Resilient Floor* opinion is of limited authority, given its alternative holdings and its ultimate conclusion that the workers in question were independent contractors and not, in fact, covered employees. Moreover, the excerpt from *Resilient Floor* quoted by the district court – that "'an intent to evade' preexisting obligations is 'clearly the focus of the alter ego doctrine'" – is taken from the statement in *Allcoast* that "[t]he alter ego doctrine was developed to prevent employers from evading obligations under the [LMRA] merely by changing or altering their corporate form." *Allcoast*, 780 F.2d at 579. But, confusing the *purpose* of the alter ego doctrine with the Sixth Circuit's *test for determining whether it should be applied* apparently led the district

court in this case to conclude – incorrectly – that evidence of an intent to evade was a prerequisite to the doctrine's imposition.

It bears repeating at this point that evidence of an intent to evade, when it presents itself, is a relevant factor to be considered in determining whether the alter ego doctrine is applicable, along with "the well-established factors of substantial identity of management, business purpose, operation, equipment, customers, supervision and ownership" – but it is *not* essential to the imposition of alter ego status. *Id.* at 581; *see also Fullerton Transfer*, 910 F.2d at 337 ("[T]his Circuit has not required . . . a showing of employer intent in order to apply the liberalized alter ego standard. . . . [because] intent can too easily be disguised."). To the extent that *Resilient Floor* can be seen to conflict with the holding in *Allcoast Transfer* and *Fullerton Transfer*, we suggest that it should be confined to its facts.

That brings us to the application of the recognized factors to the situation in this case. As noted above, the record is replete with evidence of entanglement between LaSalle and Industrial Contracting. The defendants do not contest those facts on appeal, nor could they, given the documentary nature of the plaintiffs' proof. Instead, they maintain that they have never acted purposefully to evade union obligations and that it is the plaintiffs who were guilty of "culpability or bad faith" in suing the defendants "concerning on-going audits with which [the defendants] were already cooperating." Under these circumstances, we conclude that summary judgment should have been entered in favor of the plaintiffs, and

we therefore remand the case to the district court with instructions to enter such an order.

## *CONCLUSION*

For the reasons set out above, the judgment of the district court is REVERSED, and the case is REMANDED for entry of judgment in favor of the plaintiffs.

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**Nos. 08-1457; 08-1994**

**[Filed September 17, 2009]**

| | |
|---|---|
| TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS, Plaintiffs-Appellants/Cross-Appellees, | ) |
| v. | ) |
| INDUSTRIAL CONTRACTING, LLC, a Michigan limited liability company, and LASALLE GROUP, INC., a Michigan corporation, Defendants-Appellees/Cross-Appellants. | ) |

Before: BATCHELDER, Chief Judge; DAUGHTREY and MOORE, Circuit Judges.

**JUDGMENT**

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED, and the case is REMANDED for entry of judgment in

favor of plaintiffs Trustees of the Detroit Carpenters Fringe Benefit Funds.

**ENTERED BY ORDER OF THE COURT**

/s/
Leonard Green
Clerk

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**Case No. 05-71141**
Honorable John Corbett O'Meara

**[Filed July 14, 2008]**

| | |
|---|---|
| TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS, Plaintiffs, | ) |
| v. | ) |
| INDUSTRIAL CONTRACTING, L.L.C.; and THE LASALLE GROUP, INC., Defendants. | ) |

**OPINION AND ORDER DENYING DEFENDANTS' MARCH 12, 2008 MOTIONS FOR FEES AND COSTS AND DENYING DEFENDANT LASALLE'S MAY 12, 2008 MOTION TO STRIKE**

This matter came before the court on defendants The LaSalle Group's ("LaSalle's") and Industrial Contracting's March 12, 2008 motions for attorney fees and costs and defendant LaSalle's May 29, 2008

motion to strike Plaintiffs' notice of supplemental authority. Plaintiffs filed a response to Defendants' fees motions March 26, 2008; and defendant LaSalle filed a reply April 2, 2008. Plaintiffs filed a response to LaSalle's motion to strike June 11, 2008. Pursuant to Local Rule 7.1 (e)(2), no oral argument was heard.

On July 25, 2007, this court granted summary judgment to Defendants on Plaintiffs' complaint, which sought to audit Defendants and to find Defendants liable pursuant to a collective bargaining agreement under an alter ego theory. The complaint sought, among other things, "all sums shown by the audit to be due to Plaintiffs." Complaint at p. 3, ¶C. After the court's ruling on Defendants' motions for summary judgment, Plaintiffs filed a motion for reconsideration, which the court denied March 4, 2008. Defendant LaSalle now seeks $107,576.11 in attorney's fees and costs for the services rendered by Steven A. Wright, P.C.; defendants Industrial Contracting and LaSalle seek an additional $68,671.68 in attorney's fees and costs for the services rendered by Abbott Nicholson, P.C.

## LAW AND ANALYSIS

The court has discretion to permit an award of attorney's fees in this case pursuant to 29 U.S.C. § 1132(g)(1). When exercising its discretion, the trial court should consider the following factors:

> (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the

> party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

Tiemeyer v. Community Mut. Ins. Co., 8 F.3d 1094, 1101 (6th Cir. 1993) (citing Secretary of Dep't of Labor v. King, 775 F.2d 666, 669 (6th Cir. 1985)).

In this case there is a certain degree of culpability, but perhaps not bad faith, on the part of Plaintiffs. The complaint alleged that Plaintiffs were compelled to file suit because "[d]espite demands by Plaintiffs, Defendant has failed, neglected and refused to permit the audit." Complaint at ¶9. However, Robert Reeves, Plaintiffs' auditor, testified that up to and through the time of filing the complaint, there was nothing in his file to show that Defendants had either failed to provide any information requested or failed to fully cooperate with the audit. Reeves dep. at p. 19-25. When Plaintiffs decided to pursue the alter ego claim against Defendants, Plaintiffs suspended the audit and filed this action. In retrospect, Plaintiffs may have been hasty in the filing of this suit; however, after they decided to pursue an alter ego claim, it is doubtful the parties would have resolved their issues without litigation.

As for the second factor, Plaintiffs have the ability to satisfy and award of attorney's fees. Third, it is difficult to speculate whether an award of fees in this case may have a deterrent effect on other suits against similar employers who withdraw from multiple-employer collective bargaining agreements. Fourth, although Defendant sought to confer a common benefit

on all participants and beneficiaries of that particular plan, the suit failed to resolve significant legal questions regarding ERISA. Finally, despite the fact that Defendant ultimately prevailed in this lawsuit, the court finds that the suit was not entirely without merit. For all of these reasons, the court will deny Defendants' motions for fees and costs pursuant to both 29 U.S.C. § 1132(g)(1) and Rule 54(d)(1) of the Federal Rules of Civil Procedure.

**ORDER**

It is hereby **ORDERED** that defendants LaSalle's and Industrial Contracting's March 12, 2008 motions for fees and costs are **DENIED.**

It is further **ORDERED** that defendant LaSalle's May 29, 2008 motion to strike Plaintiffs' notice of supplemental authority is **DENIED.**

s/John Corbett O'Meara
United States District Judge

Date: July 14, 2008

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, July 14, 2008, by electronic and/or ordinary mail.

s/William Barkholz
Case Manager

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**Case No. 05-71141**
**Honorable John Corbett O'Meara**

**[Filed March 4, 2008]**

| | |
|---|---|
| TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS, | ) |
| Plaintiffs, | ) |
| v. | ) |
| INDUSTRIAL CONTRACTING, L.L.C.; and THE LASALLE GROUP, INC., | ) |
| Defendants. | ) |

**ORDER**
**DENYING PLAINTIFFS' MOTION**
**FOR RECONSIDERATION AND**
**GRANTING DEFENDANTS' MOTION TO**
**STRIKE PLAINTIFFS' REPLY**

This matter came before the court on Plaintiffs' August 8, 2007 motion for reconsideration. Defendants

filed a response November 7, 2007; and Plaintiffs filed a reply brief November 20, 2007. Defendants then filed a motion to strike Plaintiffs' reply brief on November 27, 2007; and Plaintiffs filed a response to that motion November 30, 2007. Pursuant to Local Rule 71.(g)(2)(E.D. Mich. Dec. 1, 2005), no oral argument was heard.

> Generally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties have been misled but also show that correcting the defect will result in a different disposition of the case.

Local Rule 7.1(g)(3).

In this case Plaintiffs have failed to demonstrate a palpable defect by which the court and the parties have been misled. Plaintiffs' motion for reconsideration merely presents the same issues and reiterates the same arguments the court has already considered and rejected. Therefore, the court must deny Plaintiffs' motion for reconsideration.

Moreover, Plaintiffs filed a reply brief to their motion for reconsideration without leave of the court. Because neither the Federal Rules of Civil Procedure nor the Local Rules for the Eastern District of Michigan contemplate the filing of such a brief, Plaintiffs' reply will be stricken from the record. The court notes, however, that even if it accepted Plaintiffs'

reply brief, it would not result in a different disposition of the case.

**ORDER**

It is hereby **ORDERED** that Plaintiffs' August 8, 2007 motion for reconsideration is **DENIED.**

It is further **ORDERED** that Defendants' November 27, 2007 motion to strike Plaintiffs' reply brief is **GRANTED.**

s/John Corbett O'Meara
United States District Judge

Date: March 3, 2008

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, March 3, 2008, by electronic and/or ordinary mail.

s/William Barkholz
Case Manager

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**Case No. 05-71141**
Honorable John Corbett O'Meara

**[Filed July 25, 2007]**

TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS,

Plaintiffs,

v.

INDUSTRIAL CONTRACTING, L.L.C.; and THE LASALLE GROUP, INC.,

Defendants.

**MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT LASALLE'S NOVEMBER 16, 2006 MOTION FOR SUMMARY JUDGMENT; GRANTING DEFENDANT LASALLE'S JANUARY 8, 2007 MOTION TO EXCLUDE EVIDENCE, PRECLUDE WITNESS TESTIMONY AND STRIKE PORTIONS OF PLAINTIFFS' RESPONSE BRIEF; DENYING AS MOOT PLAINTIFFS' JANUARY 12, 2007**

**MOTION FOR PARTIAL SUMMARY JUDGMENT; AND DENYING AS MOOT DEFENDANT LASALLE'S MARCH 1, 2007 MOTION FOR SCHEDUING ORDER**

This matter came before the court on defendant The LaSalle Group's ("LaSalle's") November 16, 2006 motion for summary judgment; defendant LaSalle's January 8, 2007 motion to exclude evidence, preclude witness testimony, and strike portions of Plaintiffs' response brief; Plaintiffs' January 12, 2007 motion for partial summary judgment; and defendant LaSalle's March 1, 2007 motion for scheduling order. All of these motions were fully briefed except Plaintiffs' motion for partial summary judgment, which the court interprets as a cross-motion to LaSalle's motion for summary judgment. Oral argument on LaSalle's motion for summary judgment was heard February 1, 2007; and although no other motions were set for hearing that day, the court heard argument on the motions that were pending as of that date.

**BACKGROUND FACTS**

Defendant Industrial Contracting ("Industrial") was incorporated August 21, 2001. Defendant The LaSalle Group terminated its collective bargaining agreement ("CBA") with the Michigan Regional Council of Carpenters ("MRCC") effective May 31, 2003; and on June 1, 2003, the following day, Industrial entered into a CBA with the union. That CBA is still in effect.

The gravamen of the complaint is that Defendants "are alter egos and are each contractually obligated to Plaintiffs pursuant to the collective bargaining

agreement with the union." Complaint at 3. The alter ego analysis was created to stop companies from changing their operations to avoid preexisting union obligations, *i.e.*, a union-represented company forms a non-union company and funnels its work to the latter to avoid paying pension benefits to the funds.

Plaintiffs seek an order directing Defendants to submit their books and records for auditing. The plaintiff funds, however, do not claim that LaSalle or Industrial owe any fringe benefits for any of Defendants' employees; rather, the funds seek fringe benefits for LaSalle's subcontractors' employees.

For the first time in this litigation, Plaintiffs alleged in their response brief to LaSalle's motion for summary judgment that "LaSalle is bound to the local MRCC collective bargaining agreement through its international agreement with the United Brotherhood of Carpenters and Joiners of America ("UBCJA")." Plaintiffs' resp. br. at 2. Throughout discovery, Defendants proceeded under the assumption that Plaintiffs were not disputing that LaSalle legally terminated its agreement with the union on May 31, 2003. Following the filing of Plaintiffs' response brief, however, defendant LaSalle filed a motion to exclude evidence and preclude witness testimony and to strike portions of Plaintiffs' response brief that allege that LaSalle is still bound to the union contract by way of LaSalle's May 28, 1997 agreement with the international.

## LAW AND ANALYSIS

As a preliminary matter, the court will grant defendant LaSalle's motion to, among other things,

strike portions of Plaintiffs' response brief. Plaintiffs failed to raise the issue of LaSalle's 1997 agreement with the United Brotherhood of Carpenters and Joiners of America ("UBCJA"), the international union, until their response to LaSalle's motion for summary judgment. Throughout discovery, there was no mention of this agreement. Importantly, there is nothing in the complaint that puts Defendants on notice that Plaintiffs were going to rely on that agreement. Instead, the parties conducted discovery, which ended November 10, 2006, under the assumption that LaSalle had legally terminated its CBA with the Michigan Regional Council of Carpenters. Plaintiffs' introduction of LaSalle's agreement with the UBCJA would fundamentally alter the nature of this suit. Therefore, the court will grant LaSalle's motion to exclude evidence, preclude witness testimony and strike portions of Plaintiffs' response brief.

The United States Court of Appeals for the Sixth Circuit has adopted the NLRB test to determine whether two enterprises constitute alter egos: whether the two have substantially identical management, business, purpose, operation, equipment, customers, supervision, and ownership. NLRB v. Fullerton Transfer & Storage Ltd., Inc., 910 F.2d 331, 336 (6th Cir. 1990). More recently, the Sixth Circuit refined this test in Trustees of Resilient Floor Decorators Ins. Fund v. A&M Installations, Inc., 395 F.3d 244 (6th Cir. 2005).

In the more recent case, the court affirmed the district court's finding that two enterprises were not alter egos even though the two worked on many of the same projects, had the same customers, shared office

and warehouse space in the same building, shared office equipment and staff, and answered each other's phones and assisted with payroll. Id. at 246. The appellate court explained that the alter ego doctrine hinges on the "intent to evade" fringe benefit obligations.

> Resilient Floor disregards the fact that 'an intent to evade' preexisting obligations is 'clearly the focus of the alter ego doctrine.' In the absence of some 'indication that the relations between [the companies] has changed over the years or has caused the [union] to receive less than that for which it bargained,' there is no inequity that would justify a court's imposition of liability.
>
> Our own court faced this same argument in a case with nearly identical facts to those presented here, in which an affiliate of Resilient Floor was the plaintiff, and we refused to apply the alter ego theory after concluding that there was 'no injustice, fraudulent intent, or need to protect employees from being deprived of anticipated benefits' that could justify an extension of the doctrine. Because Resilient Floor has not alleged in the present litigation that A & M concealed its close relationship with Carpet Workroom, and because there is no indication that Resilient Floor has not received the full benefit of its collective bargaining agreement with A & M, the application of the alter ego doctrine is inappropriate here as well.

Resilient Floors, 395 F.3d at 248 (citations omitted).

In Cement Masons' Pension Trust-Fund v. McCarthy, No. 04-74006, 2006 WL 770444, at *4, E.D. Mich. 2006), this court recently found that the Sixth Circuit has "categorically rejected application of the alter ego doctrine in the . . . situation . . . where a nonunion company establishes a union company and no preexisting labor obligations are disrupted."

In this case Plaintiffs have shown most of the similarities between LaSalle and Industrial that were required under Fullerton. However, under Resilient Floors, they are now required to do more, that is, to show LaSalle's intent to evade preexisting obligations to the union by creating a new company. This Plaintiffs have failed to do. Industrial was established almost two years before LaSalle ended all of its obligations to the union under the CBA; and LaSalle continued to meet its obligations until it terminated the CBA effective June 1, 2003. Plaintiffs have failed to present any evidence to show that Industrial was formed or operated with the intended purpose of evading any of LaSalle's preexisting contractual obligations. Therefore, the court finds as a matter of law that the alter ego doctrine is inapplicable in this case; and LaSalle is no longer bound by the conditions of the CBA.

## ORDER

It is hereby **ORDERED** that defendant LaSalle's January 8, 2007 motion to exclude evidence, preclude witness testimony, and strike portions of Plaintiffs' response brief is **GRANTED.**

It is further **ORDERED** that defendant LaSalle's November 16, 2006 motion for summary judgment is **GRANTED.**

It is further **ORDERED** that Plaintiffs' January 12, 2007 motion for partial summary judgment is **DENIED AS MOOT.**

It is further **ORDERED** that LaSalle's March 1, 2007 motion for scheduling order is **DENIED AS MOOT.**

s/John Corbett O'Meara
United States District Judge

Dated: July 25, 2007

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, July 25, 2007, by electronic and/or ordinary mail.

s/William Barkholz
Case Manager

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

**Case No. 05-71141**
**Hon. John Corbett O'Meara**

**[Filed July 25, 2007]**

| | |
|---|---|
| TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS, | ) |
| Plaintiffs, | ) |
| v. | ) |
| INDUSTRIAL CONTRACTING, L.L.C.; and THE LASALLE GROUP, INC., | ) |
| Defendants. | ) |

**JUDGMENT**

For the reasons set forth in the court's July 25, 2007, Memorandum Opinion and Order, IT IS HEREBY ORDERED that judgment is entered in favor of Defendants.

Dated: July 25, 2007

DAVID WEAVER
Clerk, U.S. District Court

By: William Barkholz

Deputy Clerk

Approved:

John Corbett O'Meara
United States District Judge

## APPENDIX E

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**Nos. 08-1457/1994**

**[Filed November 12, 2009]**

| | |
|---|---|
| TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS, Plaintiff-Appellant/Cross-Appellee, | ) |
| v. | ) |
| INDUSTRIAL CONTRACTING, LLC, A MICHIGAN LIMITED LIABILITY COMPANY, ET AL., Defendants-Appellees/Cross-Appellants. | ) |

ORDER

**BEFORE:** BATCHELDER, Chief Judge; DAUGHTREY and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

/s/
Leonard Green
Clerk

# APPENDIX F

## STATUTES

### 29 U.S.C. § 158. Unfair labor practices

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or

provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

**29 U.S.C. § 159. Representatives and elections**

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

**29 U.S.C. § 186. Restrictions on financial transactions**

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting

commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such

employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity

or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5)

of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: *Provided,* That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further,* That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.]; or (9) with

respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Penalties for violations

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction

thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) Effective date of provisions

This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds

Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to

January 1, 1947, such funds contained provisions for pooled vacation benefits.

Supreme Court, U.S.
FILED
APR 20 2010
OFFICE OF THE CLERK

No. 09-962

IN THE

# Supreme Court of the United States

LASALLE GROUP INCORPORATED,

*Petitioner,*

*v.*

TRUSTEES OF THE DETROIT CARPENTERS FRINGE BENEFIT FUNDS,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to grant the Petition, where the Sixth Circuit's rigorous analysis of the evidence and alter ego law does not conflict with a decision of this Court or a Court of Appeals nor does it implicate an important federal question that has not been settled by this Court.

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## INTRODUCTION

The decision of the Sixth Circuit does not conflict with a decision of this Court or any Court of Appeals nor does it implicate a federal question that has not been decided by this Court. In this case, the Trustees of the Detroit Carpenters Fringe Benefit Funds (the "Funds") seek damages against the defendants for breach of their collective bargaining agreements ("CBAs"). The Sixth Circuit found that there was a "mountain of evidence" establishing the defendants were alter egos and also found that the defendants had breached their obligations to pay certain fringe benefits to the Funds. The fact intensive nature of this case, the fact intensive nature of the alter ego doctrine, the equitable judgments made by the Courts of Appeals and District Courts in applying the alter ego doctrine, and the uniform application of the alter ego standards by the various Circuit Courts, all mandate that this case is not appropriate for Supreme Court review.

## STATEMENT OF THE CASE AND GOVERNING FACTS

In 2001, The LaSalle Group, Inc. ("LaSalle"), a union company, altered its structure and created Industrial Contracting, LLC ("Industrial"), a non union company, while LaSalle was signatory to a CBA with the Michigan Regional Council of Carpenters, ("MRCC"). The CBA prohibits LaSalle from subcontracting carpentry work to non union contractors. LaSalle and Industrial have substantially identical ownership, management, business purpose, operations, customers, and supervision. LaSalle and Industrial are alter egos.

Between 2001 and 2003, LaSalle used its alter ego Industrial to subcontract carpentry work to non union contractors to evade LaSalle's CBA obligations.

On June 1, 2003, LaSalle again altered its structure by changing the alter ego operation's union signatory from LaSalle to Industrial. This change allows the LaSalle/Industrial alter ego entity to continue to evade its CBA obligations at the same time as it benefits from lucrative contracts that are only available to signatory union contractors by claiming union status on one job through Industrial and non-union status on another job through LaSalle, even though the companies' actual operations are combined.

### A. Lasalle and Industrial Always Have Been And Continue to Be Alter Egos

LaSalle's Petition For Writ of Certiorari asks the Court to ignore relevant facts, mischaracterizes the facts in the record, and omits relevant facts to argue that there was no evidence of LaSalle's use of Industrial to avoid its historic collective bargaining agreement obligations or evidence that the Funds were worse off because of the alter ego relationship. The facts clearly show that:

(1) LaSalle formed Industrial at a time when LaSalle was a signatory contractor and was bound to a collective bargaining agreement with the MRCC; (2) LaSalle subcontracted covered carpentry work through its non union alter ego Industrial for over a year and a half prior to LaSalle's "termination" of its collective bargaining agreement with the MRCC;

(3) Neither LaSalle nor Industrial made fringe benefit contributions for the carpentry work LaSalle subcontracted through Industrial for this time period; (4) LaSalle's subcontracting of covered carpentry work through non union carpentry contractor Industrial was a violation of the subcontracting clause of LaSalle's collective bargaining agreement with the MRCC; and (5) In 2003 LaSalle caused Industrial to sign a CBA and sent a letter of "termination" of LaSalle's CBA to the MRCC and "transferred" LaSalle's "union" work to Industrial in an attempt to shield LaSalle from LaSalle's historic fringe benefit obligations while allowing it to continue to work on large "union" jobs through Industrial.

### B. Lasalle Used Industrial to Evade its CBA Obligations

LaSalle was incorporated on December 12, 1990. RE No. 42-6, pp. 1-4; ROA pp. 246-249. LaSalle was signatory to the MRCC CBA when Steven Palermo became an owner of LaSalle in 1995. RE 42-13 , p. 9, ROA p. 311, and RE 42-13, p. 3, ROA p. 305. LaSalle does not dispute that it was a signatory with the MRCC prior to its "termination" effective June 1, 2003. RE 37, p. 7; ROA p. 141.

Steven Palermo, while president of LaSalle, originally formed Industrial on August 21, 2001, with the name of Palermo Development, LLC, ("Palermo Development"). RE No. 42-8, p. 1; ROA p. 279. On October 21, 2002, the name Palermo Development was changed to Industrial Contracting, LLC. RE No. 42-9, p. 1; ROA p. 280. Industrial was not signatory to any

union agreements with the MRCC until it signed the 2000-2003 MRCC Independent Agreement on June 1, 2003. RE 37, p. 7; ROA p. 141. LaSalle terminated its CBA with the MRCC effective June 1, 2003. RE No. 37, p. 7; ROA p. 141.

In January of 2002, LaSalle used Industrial, then known as Palermo Development, to sub-contract carpentry work to non-union contractors for the construction of an office building located at 42560 Van Dyke Ave, (the "Adamo Project")[1]. RE No. 42-24, pp. 1-36; ROA pp. 476-511. The sub-contract stated its scope of work as, "carpentry complete pursuant to plans", and is signed on behalf of Palermo Development by "Randy Palermo, VP of Estimating" and witnessed by Penny Holman. RE No. 42-24, p. 2; ROA p. 477. Penny Holman is LaSalle's accounting office manager. RE No. 42-21 p. 2; ROA p. 424. Randy Palermo was and is the VP of Estimating for LaSalle. RE No. 42-12, p. 3; ROA p. 299.

Notwithstanding the above mentioned documents, Randy Palermo testified that he has had no involvement with Palermo Development or Industrial, he has not received any money from Industrial, he does not remember ever having signed any documents on behalf of Palermo Development or Industrial, and all of his income is from LaSalle. RE No. 42-12, p. 4, ROA p. 300. Randy Palermo further testified that he does not know

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1. LaSalle's CBA prohibited it from subcontracting covered carpentry work to a non union subcontractor and required LaSalle to be surety for nonpayment of delinquent fringe benefit contributions for all covered work which has been subcontracted. RE NO. 43-29, p.19; ROA pp. 778.

what Industrial actually does and that he is not familiar with any contact between Industrial and LaSalle. RE No. 42-12, p. 4, ROA p. 300.

Palermo Development sub-contracted with P&J Contracting on January 21, 2002, for carpentry work including roofing, installation of skylights and flashing. RE No. 42-24 pp. 20-23; ROA pp. 495-497. The P&J Contracting sub-contract is stamped, "Received Jan 28, 2002, LaSalle, Inc.," RE No. 42-24 p. 20; ROA p. 495. The P&J subcontract is Number 02001-070500 and is again signed on behalf of Palermo Development by "Randy Palermo, VP of Estimating" and witnessed by Penny Holman. RE No. 42-24 pp. 20-21; ROA pp. 495-496. On October 4, 2002 (invoice incorrectly says 2001) P&J Contracting issued an invoice for sub-contract number 02001-070500 to LaSalle. RE No. 42-25 p.1, ROA p. 512. On March 7, 2002, Chester Jablonski, LaSalle's Controller, issued a Palermo Development check to P&J Contracting for $7,767.00 for the LaSalle invoice. RE No. 42-27 p. 3; ROA p. 529. The date, amount and check number from the Palermo Development check are all recorded on the paid stamp on P&J Contracting's invoice to LaSalle. RE No. 42-25 p.1, ROA p. 512.

On February 6, 2002, John's Lumber issued an invoice to Palermo Development for the Adamo Project (02001-620205) for $24,999.00; this invoice was stamped, "Received FEB 08, 2002, LaSalle, Inc." RE No. 42-25 p.3; ROA p. 514. The job and cost code number on the John's Lumber invoice matches a Palermo Development purchase order authorized by "R.P." (Randy Palermo) dated January 14, 2002; the invoice was paid on February 21, 2002, with a Palermo Development check.

RE No. 42-27 p. 1.; ROA p. 527. John's Lumber issued another invoice to Palermo Development on May 30, 2002, which was also marked, "Received JUN 08, 2002, LaSalle, Inc." RE No. 42-25 p.5; ROA p. 516.

Palermo Development received invoices from Cassino Building and Development, LLC, for the installation of a fence and an invoice from Duro Construction Co., Inc., for site grading which is stamped "Received LaSalle, Inc. RE No. 42-25 pp. 6-7; ROA pp. 517-518. See also RE No. 42-25 p. 9; ROA p. 520.

P&J Contracting, Cassino Building and Development and Duro Construction Co., Inc., are not signatory carpentry contractors with the MRCC and none of them have made any fringe benefit contributions to the MRCC Funds for carpentry work performed by their employees and no one has ever submitted fringe benefit payments for the work performed by their employees. Affidavit of MRCC Fund Investigator/ Collection Coordinator Cipolla. RE No. 42-26, pp. 1-2, ROA pp. 525-526.

LaSalle was able to evade the subcontracting provision of its CBA by having its alter ego Industrial subcontract covered carpentry work to non union carpenters.

### C. Lasalle Cannot Evade its CBA Obligations By Changing its Corporate Structure

An alter ego is subject to all of the legal and contractual obligations of the predecessor. *Howard Johnson Co. v. Detroit Local Joint Executive Board Hotel & Restaurant*, 417 U.S. 249, 261 (1964)(citing *Southport Petroleum Co.* v. NLRB, 315 U.S. 100, 106 (1942)). LaSalle and Industrial have been alter egos from the date of Industrial's formation. LaSalle used Industrial for a year and a half to evade its CBA obligations prior to its "terminating" its CBA.

LaSalle "terminated" its collective bargaining agreement effective the same day it caused Industrial to become a signatory to the MRCC collective bargaining agreement. RE No. 37-3, p. 1; ROA p. 151; RE No. 37-6, pp. 1-2; ROA pp. 154-155. LaSalle argues that it was a non union contractor when Industrial signed its CBA, however, LaSalle's termination was not effective until June 1, 2003, the same day Industrial's contract became effective. Regardless of La alle's attempt to switch the union face of the alter ego entity, LaSalle and Industrial were alter egos at the time of the switch and they continue to be alter egos. LaSalle, as Industrial's alter ego, is bound to Industrial's June 1, 2003, CBA with the MRCC just as Industrial, as LaSalle's alter ego, was bound to LaSalle's CBA with the MRCC.

LaSalle believes it can avoid the fact that it had been operating Industrial as an alter ego to evade its historic collective bargaining obligations for a year and a half by switching its CBA obligation to Industrial. LaSalle argues, "because both LaSalle and Industrial were non

union companies as of May 31, 2003, LaSalle had no union obligations to 'transfer' or evade.[2] LaSalle believes that this change, which allowed it to retain essentially the same business, can cleanse LaSalle of its history of alter ego operations and allow it to continue its alter ego operations free of challenge by arguing that LaSalle was non union when its alter ego Industrial entered into its collective bargaining agreement.

The alter ego doctrine was created to prevent employers from evading labor laws by merely altering their corporate form. *Southport Petroleum Co.*, 315 U.S. at 106.

LaSalle was avoiding its historic collective bargaining obligations by subcontracting covered work to its non union alter ego. It changed its structure by having its alter ego become the signatory contractor to allow it to escape the unwanted obligation, not by terminating its CBA, but by having its alter ego enter into a new CBA to allow it to benefit from lucrative union carpentry work while at the same time enjoying the benefit of subcontracting non union carpentry work.[3]

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2. This is not true. LaSalle's CBA was in effect through 11:59 pm, May 31, 2003, and Industrial's CBA became effective 12:00 am, June 1, 2003. Termination Letter, Appellee Motion for Summary Judgment, RE No. 37-3, p. 1; ROA p. 151; Industrial CBA, Id., RE No. 37-6, pp. 1-2; ROA pp. 154-155.

3. A benefit no other union signatory contractor would have. The loss of lucrative union carpentry work to a non union carpentry contractor certainly harms the union and the Funds.

LaSalle continued to represent itself to the construction world as a union contractor after its "termination" of its CBA with the MRCC effective June 1, 2003. LaSalle represented itself to general contractor Walbridge Aldinger, ("Walbridge") as a union contractor in 2005 on the DCX World Engine Plant in Dundee, Michigan. Walbridge's project manager for the DCX job, Mickey O'Hearn testified that LaSalle could not bid on the DCX job unless it was a union signatory. RE No. 43-21 pp. 2-3; ROA pp. 657-658. LaSalle executed a contract for the DCX job with Walbridge that required LaSalle to be a union signatory. Paragraph fifteen of the Walbridge contract for the DCX job, which was signed by LaSalle on May 19, 2005, states, "The Subcontractor **shall be signatory** and shall adhere to the terms and conditions of the applicable local Trade Union Labor Agreements.", (emphasis added). RE No. 43-22 p. 10; ROA p. 670. O'Hearn testified that LaSalle told him that they were employing union people. RE No. 43-21 p. 3; ROA p. 658.

LaSalle treated Industrial employees as LaSalle employees on the DCX job. Scott Nemecek, LaSalle's President in 2005, testified that on September 12, 2005, LaSalle submitted a quote for extra work to Walbridge Aldinger for the Daimler Chrysler World Engine project that included hours for self-perform labor and supervision. RE No. 42-11 p. 12; ROA p. 295; RE No. 43-27 pp. 1-2; ROA pp. 753-754. The self performed labor and supervision referenced in the September 12, 2005, quote is for carpentry work that would be performed by Industrial employees. RE No. 42-11 p.13; ROA p. 296.

Scott Nemecek testified that Industrial employees were listed as employees of LaSalle on a union job for General Motors because LaSalle is able to charge its customers more money if the customer believes the work is being self performed by LaSalle. RE No. 42-11 pp. 11-12; ROA pp. 294-295. Scott Nemecek admitted that LaSalle does not treat Industrial as a "true subcontractor" primarily so they can mark up the work with the labor at a higher rate. RE No. 42-11 p. 12; ROA pp. 295. Nemecek testified that the mark up for "self perform" work can be as much as five percent, "twice in some cases, and some contracts don't let the subs mark up anything." RE No. 42-11 p. 12; ROA p. 295.

LaSalle represents itself to the construction world as a union contractor. LaSalle uses Industrial employees for the sole benefit of LaSalle.[4] LaSalle does not treat Industrial as a "true subcontractor" because LaSalle and Industrial are alter egos. There is no distinction between LaSalle and Industrial in their operations or in the way they hold themselves out to the construction industry.

LaSalle cannot be allowed to evade its CBA obligations by switching the signatory company of the LaSalle/Industrial alter ego entity. There is no distinction between LaSalle and Industrial. The LaSalle/Industrial alter ego entity has been operating in the construction industry as a single entity and has only represented itself as a separate entity to the unions and the courts.

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4. At the time the Funds filed their lawsuit, "Industrial contracting had never supplied laborers to any company other than LaSalle." *Trustees of the Detroit Carpenters Fringe Benefit Funds v Industrial Contracting, LLC*, 581 F.3d at 313, 316 (6th Cir. 2009).

## D. Lasalle and Industrial Are Alter Egos

LaSalle and Industrial have substantially identical ownership, management, business purpose, operations, equipment, customers, and supervision. The facts supporting these alter ego factors are set forth in *Trustees of the Detroit Carpenters Fringe Benefit Funds v Industrial Contracting, LLC*, 581 F.3d 313, 315-318 (6th Cir. 2009). The Sixth Circuit notes, "the record is replete with evidence of entanglement between LaSalle and Industrial Contracting. The defendants do not contest those facts on appeal, nor could they, given the documentary nature of the plaintiffs proofs." *Industrial Contracting*, 581 F.3d at 319. The Sixth Circuit referred to the evidence of intermingling of the two companies as a "virtual mountain of evidence." *Industrial Contracting*, 581 F.3d at 317.

LaSalle paid all of the expenses and took all of the profits from the work performed by Industrial from its formation until after the Funds brought their alter ego action in 2005. The only distinctions between LaSalle and Industrial were artificial distinctions the companies chose to tell the unions and their customers to maximize their profit. The record shows Industrial's only reason to exist is to benefit LaSalle:

1) On June 2, 2003, all of Industrial's employees had previously been employed by LaSalle. Deposition of Chester Jablonski[5], RE No. 42-21 p. 22; ROA p. 444;

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5. Chester Jablonski is the CFO of LaSalle and head of operations for Industrial. He was the contact person for both LaSalle and Industrial with the MRCC. RE No. 42-21, p. 8; ROA p. 430; *Id.*, p. 65, lines 16-20. See also RE No. 42-21, p. 17; ROA p. 449.

2) Prior to 2005 Industrial employee expenses such as gas, office supplies, hotel rooms, meals, job tools, and miscellaneous project expenses, were paid directly to the Industrial employees by LaSalle. RE No. 42-21 p. 23; ROA p. 445;

3) Industrial's workers compensation insurance was paid for directly by LaSalle through the beginning of 2005 and is in fact the same policy that covers LaSalle for workers compensation. RE No. 42-21 pp. 18-19; ROA pp. 440-441; RE No. 43-11 pp. 1-2; ROA pp. 596-597.

4) LaSalle paid Industrial's general liability insurance premiums from 2003 through the beginning of 2005. RE No. 42-21 p. 19; ROA p. 441.

5) Industrial employees used LaSalle's Nextel phones. RE No. 42-21 p. 19; ROA p. 441. Industrial did not pay any portion of the cell phone bills until sometime in 2005. RE No. 42-21 p. 12; ROA p. 434.

6) Industrial employees used LaSalle business cards. RE No. 42-21 p. 19; ROA p. 441.

7) From June 2003 to sometime in 2005 LaSalle only paid Industrial for its incurred costs, payroll, fringe benefit obligations, payroll taxes and SBT (single business tax). RE No. 42-21 p. 20; ROA p. 442.;

8) Industrial never made any money until it started charging LaSalle a 3% mark up on its costs sometime in 2005, after the Funds filed the instant suit. RE No. 42-21 p. 20-21; ROA p. 442-443.

LaSalle and Industrial are a classic alter ego operation. Union signatory LaSalle formed non union Industrial to evade LaSalle's CBA obligations. Industrial's only purpose is to assist LaSalle in evading its CBA obligations.

## ANALYSIS OF APPLICABLE LAW

### A. The Supreme Court Alter Ego Standard

This Court set forth the universally applied alter ego standard in *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942), a case in which an employer attempted to avoid its obligations to its union employees by making a technical change to its ownership. In determining whether there was an alter ego relationship between the two companies the Court looked to "whether there was a *bona fide* discontinuance and a true change of ownership – or– merely a disguised continuance of the old employer . . ." *Southport Petroleum Co.*, 315 U.S. at 106.

The *Southport Petroleum* Court never addressed whether or not an intent to evade the union obligations was a required element of an alter ego analysis because the intent was obvious from the facts of the case.

*Howard Johnson Co. v. Detroit Local Joint Executive Board Hotel & Restaurant Employees*, 417 U.S. 249 (1974), relied upon by the Petitioner, is not to the contrary. *Howard Johnson* was a successor case. There was a bona fide purchase and sale, an arm's length relinquishment of control between two independent entities. *Southport Petroleum* was an alter ego case

because of the disguised continuance of the original employer. As the *Howard Johnson* Court recognized, "it is important to emphasize that this is not a case where the successor corporation is the alter ego of the successor company, where it is 'merely a disguised continuance of the old employer'." *Howard Johnson Co.*, 417 U.S. at 261 (citing to *Southport Petroleum Co.* 315 U.S. at 106.)

The difference between successor and alter ego is important. A successor, "may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of the collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them." *Howard Johnson Co.*, 417 U.S. at 261 (citing *Rohlik, Inc.*, 145 N.L.R.B. 1236, 1242 n. 15 (1964); *General Extrusion Co.*, 121 N.L.R.B. 413, 414 (1955); *Slater System Maryland Inc.*, 134 N.L.R.B. 865, 866 (1961); *Matter of ILWU (Juneau Spruce)*, 82 N.L.R.B. 650, 658-659, enforced, 189 F.2d 177 (CA 9 1951), aff'd on other grounds, 342 U.S. 237 (1952).) An alter ego is subject to all of the legal and contractual obligations of the predecessor. *Howard Johnson Co.*, 417 U.S. at 261 (citing to *Southport Petroleum Co.*, 315 U.S. at 106.)

It is also important to note that the alter ego doctrine is not limited to successor companies. The alter ego doctrine is also commonly applied in "double breasted"situations where, "coexisting employers performing the same work are in fact one business, separated only in form." *NLRB v. Fullerton Transfer & Storage Ltd., Inc.*, 910 F.2d 311, 336 (6th Cir. 1990); *See also Massachusetts Carpenters Central Collection*

*Agency v. Belmont Concrete Corporation and Alger Construction Corporation*, 139 F.3d 304 (1st Cir 1998) (applying the alter ego test to parallel companies); *Trustees of the Detroit Carpenters Fringe Benefit Funds v Industrial Contracting, LLC*, 581 F.3d 313 (6th Cir. 2009). (LaSalle and Industrial are a double breasted alter ego); *Thomas Pearson, et al. V Component Technology*, 247 F.3d 471, 486 (3rd Cir. 2001)(discussing double breasted operations used to avoid CBA obligations); *Local 282 v. Sandimo Materials*, et al., 250 F.2d 120 (2nd Cir. 2001)(Ordering trial of double breasted operations as possible alter ego); *UA Local 343 v. Nor-Cal Plumbing, Inc.*, et al., 48 F.3d 1465, 1469-1470 (9th Cir. 1994)(Discussing alter ego theory when companies try to avoid CBA obligations with double breasted operations); *Pipefitters v. Waldo R., Inc.*, et al, 872 F.2d 815 (8th Cir 1989)(Double breasted operation is alter ego); *Walter N. Yoder & Sons v. NLRB*, 754 F.2d 531 (4th Cir. 1985)(Discussing double breasted operation as possible alter ego); *NLRB v Leonard Hebert*, 696 F.2d 1120 (5th Cir. 1993)(Double breasted operation can be alter ego).

### B. Lasalle and Industrial Are Alter Egos Under the *Southport Petroleum* Standard

LaSalle and Industrial are clearly alter egos based upon the *Southport Petroleum Co.* standard. There is a "virtual mountain of evidence" establishing the intermingling of LaSalle and Industrial. *Industrial Contracting, LLC*, 581 F.3d at 317. The creation of non union Industrial was a change in structure of the employing entity that was used to avoid LaSalle's collective bargaining obligations. This change did not

involve any change in the management or ownership of LaSalle as LaSalle and Industrial had substantially identical ownership and management.

At the time Industrial was created, LaSalle was owned by three brothers, 84.96% by Steven Palermo, 7.52% by Randy Palermo, and 7.52% by Gary Palermo. RE No. 42-7 p. 11; ROA p. 260. Industrial was owned by Steven Palermo and Randy Palermo from formation on August 21, 2001, to January 1, 2004. RE No. 42-10 pp. 1-2; ROA pp. 282-283; *See also* RE No. 42-9 pp. 1-2; ROA pp. 280-281. On January 1, 2004, all of Steve Palermo's 50% interest in Industrial was sold to his brother in law Chester Jablonski for $334.50 and 1.8% of Randy Palermo's 50% interest was sold to Chester Jablonski for $6.00. RE No. 42-10 pp. 1-2; ROA pp. 282-283.

The Sixth Circuit summarized the identical management of LaSalle and Industrial,

> In addition to his majority interest in Industrial Contracting, Jablonski was LaSalle's chief financial officer and had previously served as its vice president, secretary, and treasurer. He managed the day-to-day operations for both Industrial Contracting and LaSalle, and he acted as the contact with the union for both companies. Jablonski testified that he had the authority to sign Steven Palermo's signature on LaSalle documents for "pretty much whatever I need his signature on."

*Industrial Contracting, LLC*, 581 F.3d at 316.

In 2003 LaSalle was aware that it was an obvious alter ego of Industrial and needed to change its structure again to better disguise its alter ego operations. It changed its structure by causing its alter ego to become the signatory contractor to allow it to escape its unwanted subcontracting obligations, not by terminating its CBA, but by having its alter ego enter into a new CBA to allow it to benefit from lucrative union carpentry work through Industrial while at the same time LaSalle could enjoy the benefit of subcontracting non union work.[6] This change did not involve any change in ownership or management of the LaSalle/Industrial alter ego operation.

### C. Circuit Courts Consistently Apply *Southport Petroleum* Standard

The Circuit Courts have consistently applied the *Southport Petroleum* standard in alter ego cases. The Circuits have developed various factors to review when determining whether or not two companies are alter egos. Most of these factors are based upon "single employer" factors used by the National Labor Relations Board ("NLRB"). Each Circuit uses these factors to determine whether or not there has been a change in corporate form frequently used to avoid the effect of labor laws without any substantial change in ownership or management.

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6. This change ignored the fact that LaSalle and Industrial were alter egos for two years prior to this new disguised continuance of the alter ego operation. Once an alter ego always an alter ego.

### 1. Flexible Crawford Door Standard applied by 1st, 2nd, 3rd, 6th, 11th, and DC Circuits

The Sixth Circuit, like all Circuits, looks to the circumstances surrounding a change in corporate form to determine, "whether the change resulted in a '*bona fide* discontinuance and a true change of ownership' or was merely 'a disguised continuance of an old employer.'" *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576 (6th Cir. 1986), citing *Southport Petroleum Co. v. NLRB*, 315 U.S. at 106. To determine whether the change resulted in a bona fide discontinuance and a true change of ownership or a disguised continuance of an old employer, the Sixth Circuit,

> and other circuit courts have recognized that factors relevant to finding alter ego status include 'whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership. *Nelson Electric v. NLRB*, 638 F.2d 965, 968 (6th Cir. 1981), citing *Crawford Door Sales Co.*, 226 NLRB 1144 (1976); *Goodman Piping Products Co., Inc., v NLRB*, 741 F.2d 10, 12 (2nd Cir. 1984); *NLRB v Campbell-Harris Electric, Inc.*, 719 F.2d 292, 295 (8th Cir. 1983); *NLRB v Al Bryant, Inc.*, 711 F.2d 543, 553-54 (3rd Cir. 1983), *Cert denied*, 464 U.S. 1039 (1984); *Amalgamated Meat Cutters & Butcher Workmen v. NLRB*, 663 F.2d 223, 226-27 (D.C. Cir. 1980).

*Allcoast Transfer, Inc.*, 780 F.2d at 579. This standard is commonly referred to as the *Crawford Door* standard.

Upon analyzing opinions of its sister circuits, the Sixth Circuit concluded that, "a finding of employer intent is not essential or prerequisite to imposition of alter ego status. Instead, it is merely one of the relevant factors which the Board can consider, along with the well established factors . . ." *Allcoast Transfer, Inc.*, 780 F.2d at 581.

The Sixth Circuit recognizes that an alter ego analysis should be flexible and, "under a flexible approach, no one element should become a prerequisite to imposition of alter ego status; rather, all the relevant factors must be considered together." *Allcoast Transfer, Inc.*, 780 F.2d at 582.

This same flexible approach is taken by the First, Second, Third, Eleventh, and the D.C. Circuits. Each of these Circuits apply the *Crawford Door* factors and consider the intent of the parties in creating the second company as an additional factor. None of these Circuits believe express evidence of wrongful intent is a prerequisite to the imposition of the alter ego doctrine. See *Massachusetts Carpenters Central Collection Agency v. Belmont Concrete Corporation and Alger Construction Corporation*, 139 F.3d 304 (1st Cir. 1998) (applying the alter ego test to parallel companies); *N.L.R.B. v Hospital San Rafael, Inc.*, 42 F.3d 45, 354 (1st Cir. 1994); *Goodman Piping Products, Inc. v. National Labor Relations Board*, 741 F.2d 10 (2nd Cir. 1984);*Trafford Distribution Center v. National Labor Relations Board; National Labor Relations Board v. Liberty Source W, LLC and its Alter Ego, Trafford Distribution Center*, 478 F.3d 172, 179 (3rd Cir. 2006); *Board of Trustees, Container Mechanics Welfare/*

*Pension Fund v Universal Enterprises, Inc.*, 751 F.2d 1177, 1184 (11th Cir. 1985); *Fugazy Continental Corporation v. NLRB*, 725 F.2d 1416, 1419 (D.C. Cir. 1984).

As explained by the Sixth Circuit, LaSalle and Industrial are alter egos when the flexible *Crawford Door* standard is applied. *Industrial Contracting, Supra.*

**2. Fourth Circuit's Reasonably Foreseeable Test**

When business operations are transferred, the Fourth Circuit looks to see,

> whether substantially the same entity controls both the old and the new employer. If this control exists, then the inquiry must turn to whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations. . . . To the extent that obtaining the benefit was a motive for the transfer, or was a reasonably foreseeable effect, the result represents a disguised continuance of the old employer.

*Denzil S. Alkire,v. National Labor Relations Board*, 716 F.2d 1014,1020 (4th Cir. 1983). The Fourth Circuit does not require a finding of intent to evade an obligation. The Court foresees that there will be instances where the employer intended to evade an obligation and that there "will be cases where the employer intended no evasiveness or subterfuge, but

merely seeks what it believes is a legitimate benefit offered by a strategic business reorganization". *Denzil S. Alkire*, 716 F.2d at 1020-1021.

Nevertheless, the effect is the same in both situations: the employer obtains an economic benefit at the expense of statutory employee rights, upsetting and undermining the balance of power between labor and management created to reflect national labor policy. By eliminating the benefit derived from transferring operations to a separate entity, the alter ego doctrine redresses this economic imbalance. If the employer obtains no benefit from the transfer, however, and none was reasonably foreseeable, nothing in labor policy justifies preventing it from arranging its affairs as it sees fit. *Denzil S. Alkire*, 716 F.2d at 1021.

"The imposition of alter-ego status under *Alkire* does not hinge on proof that the employer intended to evade the labor laws." *National Labor Relations Board v. Seafarers International Union of North America*, 819 F.2d 439, 445 (4th Cir. 1987).

LaSalle and Industrial would be alter egos under the Fourth Circuit's analysis. It is clear from the evidence presented to the Sixth Circuit that the same entity controls both LaSalle and Industrial and that LaSalle created Industrial to avoid the subcontracting provisions of its CBA. The evidence also shows that when LaSalle caused Industrial to execute a CBA the same day it terminated its CBA it benefitted from being able to subcontract non union carpentry work while still being able to work on union jobs at the same time.

### 3. Tenth Circuit's Flexible Approach

The Tenth Circuit does not require a finding of anti union sentiment but believes evidence of such anti union sentiment is germane. *NLRB v Tricor Products, Inc.*, 636 F.2d 266, 270 (10th Cir. 1980). The Tenth Circuit has no hard-and-fast rule,

> If an employer makes changes in its business operation to deliberately get rid of the union, the employer is more likely to be an alter ego. If, however, the employer has legitimate economic reasons for the changes, and is not motivated by anti-union sentiment, the second employer is more likely to be deemed a mere successor to the first.

*Tricor Products, Inc.*, 636 F.2d at 270.

The Tenth Circuit also considers the continuity of the work force and the relationship, if any, between the management of the old company and that of the new company. *Tricor Products, Inc.*, 636 F.2d at 270.

LaSalle and Industrial would be considered alter egos under the Tenth Circuit's approach.

### 4. Modified Crawford Door or Single Employer Factors in 5th, 7th, 8th, and 9th Circuits

The 5th, 7th, 8th, and 9th Circuits look to first establish either the *Crawford Door* factors or the NLRB's single employer factors before looking to see if the structure was changed as a sham to evade labor obligations.

### a. Fifth Circuit

The Fifth Circuit has adopted a modified *Crawford Door* standard. *J. Vallery Electric, Inc., v. National Labor Relations Board*, 337 F.3d 446 (5th Cir. 2003). The court looks to two inquiries when determining whether two companies are alter egos:

> First, the Board must determine 'whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership.' Second, it must gauge whether there was an unlawful motive behind the creation of the new business entity, determining whether there was a 'disguised continuance' or 'attempt to avoid obligations of [an existing] collective bargaining agreement through a sham transaction or technical change in operations.'

*J. Vallery Electric, Inc.*, 337 F.3d at 451, citing *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 507 5th Cir. 1982).

*J. Vallery Electric* found that there is substantial evidence of an unlawful motive in the creation of the second company based upon evidence of the transfer of real and personal property as well as stock without any consideration. This evidence, "shows that there was not even a pretense of an arm's length relationship between JVE, VE, and the principals of each during the formation of JVE." *J. Vallery Electric, Inc.*, 337 F.3d at 452.

### b. Seventh Circuit

The Seventh Circuit requires a finding of the factors necessary to support "single employer" liability (interrelationship of operations, common management, centralized control of labor relations, and common ownership) and a finding that, "the second corporation is a 'disguised continuance' of the employing enterprise, resulting in the evasion of the employer's obligations under the labor laws." *Trustees of IBEW Local 701 v. Favia Electric Company, Incorporated*, 995 F.2d at 788 (7th Cir. 1993). The "single employer" analysis is flexible. The Court stated, "Meeting all of the elements of the single employer doctrine is not essential to a finding that the alter ego doctrine applies, however." *Favia Electric Company, Incorporated*, 995 F.2d at 789.

> What is essential for the application of the alter ego doctrine, though, is a finding of "the existence of a disguised continuance of a former business entity or an attempt to avoid the obligations of a collective bargaining agreement, such as through a sham transfer of assets. In sum, unlawful motive or intent are critical inquiries in an alter ego analysis . . ."

*Favia Electric Company, Incorporated*, 995 F.2d at 789 (citing *Int'l Union of Operating Engineers v. Centor Contractors*, 831 F.2d 1309, 1319 (7th Cir. 1987)).

### c. Eighth Circuit

For the Eighth Circuit, "the essential inquiry under the alter ego analysis is 'whether there was a bona fide discontinuance and a true change of ownership * * * or merely a disguised continuance of the old employer. *Iowa Express Distribution, Inc, v National Labor Relations Board*, 739 F.2d 1305 (8th Cir. 1984) (citing *Southport Petroleum Co.*, 315 U.S. at 106. The Eighth Circuit looks to determine whether there is substantially identical ownership, management and supervision, business purpose, operation, customers, and equipment. *Iowa Express Distribution, Inc*, 739 F.2d at 1310 (Citing to *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc*, 690 F.2d 489, 507 (5th Cir. 1982). Another factor considered by the Eighth Circuit is whether there is a substantial continuity of the work force from the union to the non-union employer. *Iowa Express Distribution, Inc*, 739 F.2d at 1310 (Citing to *Carpenters Local Union No. 1846*, 690 F.2d at 507. The focus of the alter ego doctrine in the Eighth Circuit is, "on the existence of a disguised continuance of a former business entity or an attempt to avoid the obligation of a collective bargaining agreement, such as through a sham transfer of assets." *Iowa Express Distribution, Inc*,739 F.2d at 1310-1311. (Citations omitted). "Unlawful motive or intent are critical inquiries in an alter ego analysis." *Iowa Express Distribution, Inc*, 739 F.2d at 1311. (Citations omitted).

The Eighth Circuit noted, when discussing the 6th Circuit's warning that requiring intent could hinder the goals of the alter ego doctrine, "that an employer who desired to avoid union obligations might be tempted to

circumvent the doctrine by altering the corporations structure based on some legitimate business reason, retaining essentially the same business and utilizing the change to escape the unwanted obligations." *Allcoast Transfer, Inc.*, 780 F.2d at 582, the mere existence of 'some legitimate business reason' for a change in corporate organization should not alone prevent a finding of alter ego status. *Crest Tankers, Inc., v. National Maritime Union of America*, 796 F.2d 234, 238 fn. 2 (8th Cir. 1986).

**d. Ninth Circuit**

The Ninth Circuit requires a threshold showing that the two firms were a single employer. *UA Local 343 of the United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Indus. v.Nor-Cal Plumbing Inc.*, 48 F.3d 1465 (9th Cir. 1994). Single employer factors are,

> (1) common ownership, (2) common management, (3) interrelation of operations, and (4) centralized control of labor relations. See *NLRB v Don Burgess Constr. Corp.*, 596 F.2d 378, 384 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979). No one factor is controlling nor need all criteria be present. See *id.* The most important factor is centralized control of labor relations, which can be demonstrated by either showing common control of day-to-day labor matters, see *J.M. Tanaka Constr., Inc., v. NLRB*, 675 F.2d 1029, 1034 (9th Cir. 1982), or by showing that the person in charge of the union company's labor relations made the

> decision that the second company would be non-union, See *Don Burgess*, 596 F.2d at 385-86.

*UA Local 343*, 48 F.3d at 1471.

To prevail on an alter ego claim in the Ninth Circuit a plaintiff must first make the threshold showing that the two entities were a single employer and then the plaintiff must prove that the second company was being used in a sham effort to avoid collective bargaining obligations rather than for the pursuit of legitimate business objectives untainted by "union animous." *UA Local 343*, 48 F.3d at 1470.

**e. LaSalle/Industrial Are Alter Egos in the 5th, 7th, 8th, and 9th Circuits**

The Fifth, Seventh, Eighth, and Ninth Circuits would find intent to evade union obligations in the LaSalle/Industrial operations. There was no arms length relationship between LaSalle and Industrial. For three years LaSalle paid all of Industrial's expenses and Industrial provided nothing in return other than a corporate shell to evade LaSalle's CBA obligations. To this day, Industrial has never operated as a "stand alone" business entity. When LaSalle and Industrial changed the signatory entity from LaSalle to Industrial, Industrial used LaSalle as a vehicle to evade its CBA obligations. In both instances the non signatory contractor was used to subcontract covered work to non union contractors in violation of the existing collective bargaining agreement. All of the Circuits would find that the evidence of the creation and operation of the

LaSalle/Industrial entity was a disguised continuance of the entity subject to the collective bargaining agreement.

### 5. Intent

All of the Circuits include a review of intent in their analysis. Intent can be expressed by the parties or inferred from their actions. In order to have a disguised continuance there is an inference of intent. This intent can be inferred from an examination of the factors considered by each Circuit. Inferred intent is best expressed by the Sixth Circuit in *Allcoast Transfer*. After reviewing the *Crawford Door* factors, the Court found that there was,

> substantial evidence to support the Board's finding that Ward Moving is the alter ego of A.E. Ward without a determination of Harris' intent. When the circumstances so strongly support a finding of alter ego status, as they do here, the Board can properly weigh all of the factors and infer that the employer intended to evade union obligations. An inquiry into employer intent may be appropriate in other situations involving application of the alter ego doctrine but here it is simply not necessary.

*Allcoast Transfer, Inc.*, 780 F.2d at 583. The Sixth Circuit does not require a finding of express intent as a prerequisite to application of the alter ego doctrine because intent is so easily disguised,

> the doctrine was developed to prevent employers from evading obligations under the Act by merely changing or altering their corporate form. If we were to require a finding of employer intent, an employer who desired to avoid union obligations might be tempted to circumvent the doctrine by altering the corporation's structure based on some legitimate business reason, retaining essentially the same business, and utilizing the change to escape unwanted obligations.

*Allcoast Transfer, Inc.*, 780 F.2d at 582.

While the Eighth Circuit states, " Unlawful motive or intent are critical inquiries in an alter ego analysis." *Iowa Express Distribution, Inc.*, 739 F.2d at 1311. (Citations omitted); it also agrees with the Sixth Circuit that it is easy for an employer to hide it's intent behind a legitimate business reason for a change. As a result the Eighth Circuit will not prevent a finding of alter ego status because of the existence of "some legitimate business reason" for a change in corporate organization. *Crest Tankers, Inc.*, 796 F.2d at 238 fn. 2.

The Fifth Circuit looks to gauge unlawful motive behind the creation of the new business. *J. Vallery Electric, Inc.*, 337 F.3d at 451. It found the absence of an arms length transaction or arms length relationship between the companies would qualify as unlawful motive. *J. Vallery Electric, Inc.*, 337 F.3d at 452. The Circuits that do not require a finding of unlawful motive or intent would, however, find an alter ego in a situation where there is an absence of an arms length transaction

or relationship between the companies. The examination of the factors which may or may not include intent would lead to an alter ego finding. The evidence of the lack of an arms length transaction or relationship could be considered evidence of express intent or could be circumstantial intent based upon the factors considered by the particular Court.

The Seventh Circuit believes a finding of unlawful motive or intent are critical inquiries in an alter ego analysis and would find such motive or intent from the existence of a sham transfer of assets. *Favia Electric Company, Incorporated*, 995 F.2d at 789.

In the Ninth Circuit a plaintiff must prove that the second company was being used in a sham effort to avoid collective bargaining obligations rather than for the pursuit of legitimate business objectives untainted by "union animus." *UA Local 343.*, 48 F.3d at 1470.

All of the Circuits consider intent whether it be express or inferred.

## CONCLUSION

All of the Circuit Courts apply the *Southport Petroleum* standard. Each Circuit Court reviews various factors to determine whether an employer attempted to avoid its labor obligations by making a technical change to its ownership. The Courts then determine whether there is a disguised continuance of the older employer or a *bona fide* change in ownership. Each Circuit Court looks at the facts surrounding the creation of a new company or second company to determine whether it was created or used to evade labor obligations. All of the Circuit Courts will find an alter ego if a review of the facts show that there was not a significant change in ownership or management and one of the companies is being used to avoid the labor obligations of the other company. It does not matter whether the intent to evade the labor obligation was express or could be inferred from the facts of the case. When direct or circumstantial evidence differs, the Courts emphasize different evidence, but where the factors are met, alter ego status is found. The Sixth Circuit's decision should be upheld and the Petition for Certiorari should be denied.

Respectfully submitted,

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No. 09-962

# In The
# Supreme Court of the United States

LaSalle Group Incorporated,
*Petitioner*,

v.

Trustees of the Detroit Carpenters Fringe Benefit Funds,
*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## REPLY BRIEF OF THE PETITIONER

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## ADDITIONAL CONSTITUTIONAL PROVISION INVOLVED

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

## REPLY

### I. The Sixth Circuit erred in making findings of fact on issues never addressed by the district court.

Respondents' Opposition Brief ("Oppo. Brief") implies that LaSalle did something wrong to deserve a finding of alter ego status. In fact, LaSalle properly terminated its CBA with the union, and in retrospect, was found to be another union company's alter ego after that termination. The district court found that LaSalle never did anything intentionally to evade any labor law obligations, App. 29a, and the Sixth Circuit did not reverse this finding, App. 2a-14a. Instead, the Sixth Circuit threw out the "intent to evade" requirement. Now, companies like LaSalle that try

hard to comply with the labor laws may inadvertently be alter egos. The Petition should be granted to address this erroneous view of the federal labor laws in the Sixth Circuit.

### A. Respondents argue facts before this Court that were rejected as moot in the district court and not fully briefed.

The Respondents' statement of facts, which includes references to "facts" rejected by the district court as moot and re-argued to the Sixth Circuit, reveals the fundamental error in the Circuit Court below. The Sixth Circuit substituted its judgment for that of the district court and reached findings of fact concerning issues (i.e., alter ego) that the district court never fully considered. The procedural history of the dispositive motions in the district court reveals why this occurred.

LaSalle filed its motion for summary judgment on November 16, 2006, asserting that Respondents could not establish alter ego status as a matter of law because LaSalle never intended to evade any preexisting labor obligations. App. 25a; RE.37. LaSalle did not address the seven-factor alter ego test. RE.37. After briefing by the parties, the district court heard oral argument on LaSalle's motion on February 1, 2007. App. 25a.

On January 12, 2007, at the end of the briefing schedule on LaSalle's motion, Respondents filed their own motion for partial summary judgment, arguing that the facts merited a finding of alter ego by applying the seven-factor alter ego test. App. 25a. On March 1, 2007, LaSalle filed a motion for a scheduling

order to set deadlines for briefs on Respondents' motion. RE.55.

Ultimately, the district court never permitted any briefing on Respondents' alter ego motion, so LaSalle never filed a response and was not permitted to present facts that contradicted Respondents' alter ego motion. App. 25a. So LaSalle never addressed or discussed any of the seven alter ego factors. Instead, on July 25, 2007, the district court granted summary judgment in LaSalle's favor, declared Respondents' motion moot, and declared LaSalle's motion for entry of a scheduling order moot. App. 25a. So LaSalle had no opportunity to respond to Respondents' factual claims concerning the alter ego issue in the district court. Instead, the district court expressly rejected Respondents' alter ego argument as moot and never made any factual findings concerning the seven-factor alter ego test. As only Respondents briefed this issue, the district court did not have enough information to resolve the alter ego question.

On appeal, however, Respondents re-argued the "facts" concerning alter ego, even though the district court denied their motion as moot and never made any factual findings for the appellate court to review. So although LaSalle was not able to bring in additional facts to refute Respondents' factual argument because no such facts were contained within the district court record, the Sixth Circuit accepted the Respondents' view of the facts and concluded that a "mountain of evidence" supported a factual finding of alter ego status. App. 8a. Apparently recognizing the one-sided nature of the factual dispute, however, the Sixth Circuit noted: "Our inquiry ... begins with a review of the evidence, largely undisputed, that was supplied at

the summary judgment stage of the litigation." App. 3a. The evidence was "largely undisputed" because the alter ego issue was not fully briefed in the district court. Apparently the appellate court missed the district court's notation that all the dispositive "motions were fully briefed except [Respondents'] motion for partial summary judgment." App. 25a. In reversing summary judgment for LaSalle and ordering that summary judgment be entered for Respondents on the alter ego issue, the Sixth Circuit improperly substituted its judgment for that of the district court and reached findings of fact on issues never fully addressed in the district court.

A determination of alter ego status is a fact-intensive inquiry that district courts, not appellate courts, are equipped to make. "Determination of alter ego status is a question of fact to be reversed only if clearly erroneous." *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 587 (6th Cir.), *cert. denied*, 549 U.S. 1019 (2006) (citing *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 579 (6th Cir. 1986); *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942)). District courts often make alter ego findings only after trial. Because circuit courts are not fact-finders, they simply cannot assess alter ego status in the absence of an extensive trial court factual record concerning these factors. Such a record did not exist in this case because the district court found that Respondents could not get over the "intent to evade" hurdle and never even accepted briefing on Respondents' alter ego motion.

The Sixth Circuit should not have reached any findings of fact. Instead, after deciding that "intent to evade" is no longer required to prove alter ego status in the Sixth Circuit, it should have sent the case back

to the district court for full briefing on Respondents' motion for partial summary judgment, and if necessary, for trial. But because LaSalle was never able to file a response to Respondents' motion, the Sixth Circuit accepted as true the Respondents' "facts" from their motion. Even though an appellate court is an inappropriate forum for reaching findings of fact, the Sixth Circuit decided the factual dispute concerning alter ego status. At the very least, this Court should send this matter back to the lower court with instructions that the parties fully brief the alter ego issue, and that the district court hold a hearing or trial in order to reach findings of fact.

### B. Respondents' Brief contains material misstatements of fact.

Respondents suddenly claim that LaSalle and Industrial acted inappropriately before LaSalle terminated its union contract on May 31, 2003. (Oppo. Brief, pp. 15, 17 & 17 n. 6.) Respondents' brand-new claim is a red herring, and no facts exist to support it. Instead, all facts point in the opposite direction. Because the Complaint seeks an audit from June 1, 2003 forward, this case has always concerned Respondents' claim that nonunion LaSalle is the alter ego of union Industrial under Industrial's CBA effective June 1, 2003. RE.1:p.3. Respondents admit that LaSalle had an absolute right to terminate its CBA effective May 31, 2003, and that LaSalle properly did so. RE.45-8:p.3 of 5; RE.37-4.

Prior to filing this lawsuit, Respondents audited LaSalle for the period that LaSalle was a union signatory up to May 31, 2003 and found that LaSalle had paid all requisite fringe benefits and met all its

union obligations. RE.37-7. It found no evidence that LaSalle ever subcontracted carpentry work to a nonunion company in violation of LaSalle's CBA that terminated May 31, 2003, and specifically, no evidence of any improper subcontracting to Industrial before it became a union signatory. RE.37-11:p.4 of 5. Contrary to Respondents' ridiculous claim that "LaSalle and Industrial were alter egos for two years" prior to June 1, 2003 (Oppo. Brief, p. 17 n. 6), no court ever found that LaSalle and Industrial were alter egos before Industrial signed its union contract effective June 1, 2003. App. 1a-14a, 24a-30a.

Respondents' Brief contains too many material misstatements of fact to address in this short reply. However, several bear noting. Respondents falsely claim that Industrial was created in order for LaSalle to avoid its CBA obligations. (Oppo. Brief, p. 15.) In fact, the district court found that Respondents "failed to present any evidence to show that Industrial was formed or operated with the intended purpose of evading any of LaSalle's preexisting contractual obligations." App. 29a. The Sixth Circuit did not reverse this factual finding.

Industrial was formed in 2001, two years before LaSalle properly terminated its union contract. App. 5a, 25a. Industrial signed a union CBA in 2003. App. 5a, 25a. No change in corporate form occurred in 2003 or thereafter; instead, LaSalle lawfully terminated its union contract and Industrial subsequently entered into its CBA. App. 4a-5a, 25a. LaSalle had no obligations to avoid after May 31, 2003, but instead, it properly terminated its NLRA §8(f) contract. The "change in structure" requirement for finding that one entity improperly changed its corporate form to evade

union obligations does not include one entity's lawful termination of a §8(f) contract and another entity's subsequent execution of a union contract.

Respondents' "facts" stated on p. 17 of its Opposition Brief are actually fiction. They cite to no evidence in the record for their preposterous allegation that LaSalle "was aware that it was an obvious alter ego" because no evidence has ever been alleged or found concerning this claim. Incredibly, Respondents deny that LaSalle terminated its union contract, which is patently false. Respondents admitted that LaSalle had the right to terminate this contract and that it did so effective May 31, 2003. RE.45-8:p.3 of 5; RE.37-4. And both the district court and the Sixth Circuit agree that LaSalle's union contract was terminated effective May 31, 2003. App. 4a-5a, 25a.

## II. The Petition should be granted because the errors by the Sixth Circuit are so manifest.

### A. A predecessor corporation cannot be an alter ego of a successor corporation.

Respondents conceal the real issue here: that the Sixth Circuit found the *predecessor* corporation (LaSalle), which properly terminated its union contract, to be the alter ego of the *successor* corporation (Industrial), which joined the union after LaSalle terminated and which fully complied with all its union obligations. The Pension Fund Respondents want to hold nonunion LaSalle responsible for fringe benefits of nonunion subcontractors' carpentry employees. But after LaSalle properly terminated its contract, it stopped using union carpentry subcontractors for its nonunion Projects. LaSalle

honestly believed it was nonunion; even the district court found that LaSalle never intended to evade any union obligations. App. 29a. The Sixth Circuit did not reverse this factual finding.

LaSalle found no other case where a court has held a predecessor company responsible for a successor company's union obligations. Essentially, the Sixth Circuit has written "lawful termination" out of §8(f) of the LMRA. In the Sixth Circuit, nonunion contractors can no longer safely contract with union subcontractors – even on nonunion Projects – for fear that they later may be found illegal alter egos. The chilling effect of the Sixth Circuit's decision will be disastrous to unions and their members in the construction industry in Michigan and Ohio.

### B. The Sixth Circuit improperly assumed the district court's role as fact-finder.

Respondents' Opposition Brief assumes that the Sixth Circuit is using the correct alter ego standard. But the fact-intensive alter ego inquiry that they reference is inconsistently applied and results in non-uniform application of the federal labor laws. For example, Respondents admit that the alter ego inquiry is fact-intensive, yet support the Sixth Circuit's reversal of the district court, which found no alter ego status. As a result, attorneys can no longer advise construction companies in the Sixth Circuit how to terminate a §8(f) union contract properly because courts in this circuit can either follow *Trustees of the Resilient Floor Decorators Ins. Fund v. A&M Installations, Inc.*, 395 F.3d 244 (6th Cir. 2005) (proof of intent to evade plus seven alter ego factors) or the Sixth Circuit below in *Trustees of the Detroit*

*Carpenters Fringe Benefit Funds v. Industrial Contracting, LLC*, 581 F.3d 313 (6th Cir. 2009) (new "mountain of evidence" standard with no analysis of the seven alter ego factors and no consideration of intent to evade).[1] Unfortunately, attorneys will end up advising clients to set up corporations outside of Michigan and Ohio, in a circuit that is friendly to employers.

At the Sixth Circuit level, whether a district court's decision concerning alter ego will be upheld on appeal now depends upon whether the reviewing panel decides to follow the earlier-decided *Resilient Floors* case or the later decided *Carpenters* case (which attempts to limit *Resilient Floors* to the parties in that case). To assist both unions and employers, this Court should grant this Petition and set a definitive standard so that everyone involved can predict what behavior is lawful.

Respondents claim that "[t]he Fifth, Seventh, Eighth, and Ninth Circuits would find intent to evade union obligations in the LaSalle/Industrial operations." (Oppo. Brief, p. 27.) But this argument reveals the problem with the entire alter ego analysis that the Sixth Circuit performed. The question should not be whether the circuit courts would find intent to evade (as they are not triers of fact), but whether the circuit courts would find that the district court below erred in finding no intent to evade in this case. Even the Sixth Circuit did not reverse the district court's finding that

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[1] Respondents never even mention the decision in *Trustees of the Resilient Floor Decorators Ins. Fund v. A&M Installations, Inc.*, 395 F.3d 244 (6th Cir. 2005), which the district court relied upon.

LaSalle and Industrial did not intend to evade any preexisting labor obligations; instead, it decided that proof of intent to evade is no longer required to establish alter ego.

Respondents also claim that "[a]ll of the Circuit Courts apply the *Southport Petroleum* standard." (Oppo. Brief, p. 31.) In fact, as stated in the Petition, the circuit courts all cite to *Southport Petroleum*, but they do not actually use it. Instead, they whittle away at its requirements and apply their own alter ego standards. Because this Court has not accepted a petition for certiorari in a union alter ego case in thirty-six (36) years (despite at least five petitions for certiorari on alter ego issues from 1983 to 2007), the circuits have been permitted to carve out their own conflicting standards. Unfortunately, this Court has declined to step in to correct the obvious circuit splits and improper application of the rules it established in *Southport Petroleum Co. v. NLRB,* 315 U.S. 100 (1942), and *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.,* 417 U.S. 249 (1974).

Respondents focus on the "intent" factor, even though the Sixth Circuit did not reverse the district court's finding that LaSalle did not intend to evade preexisting union obligations by creating a new company. App. 29a. In doing so, Respondents demonstrate the error in reasoning that many courts make; namely, they ignore the "disguised continuance" requirement set forth in *Southport Petroleum.* Nowhere do Respondents cite to *Southport Petroleum*'s explanation that the "disguise" in "disguised continuance" means a "disguise intended to evade" the labor laws. *Southport Petroleum,* 315 U.S. at 106. If LaSalle and Industrial did not cause a "disguise

intended to evade" labor obligations, then one company cannot be the disguised continuance of the other.

Finally, Respondents essentially conclude that LaSalle and Industrial would be found alter egos in other circuits. As Respondents cite very little additional law (and no recent decisions) from the circuits on alter ego, LaSalle stands by its Petition. LaSalle would not have been found Industrial's alter ego in any other circuit, as no other circuit has found a predecessor corporation to be the alter ego of a successor corporation and bound to the successor's CBA.

## III. The Sixth Circuit's decision violates the due process clause.

Respondents' brief reveals another problem with a circuit court's attempt to rewrite the labor laws. Congress has said that double-breasting is legal (Petition pp. 21-22), but the Respondents cite to the Sixth Circuit's decision below for the proposition that double-breasting is now illegal. (Oppo. Brief p. 15.) Respondents make no response to LaSalle's statement of the current law in which Congress specifically refused to outlaw double-breasting.

If Congress tomorrow passes a law stating that double-breasting is now illegal, it would have an effective date by which construction companies would have to alter their behavior to comply with the new law. Such a law would likely pass constitutional muster under the Fifth Amendment's due process clause. Unfortunately, when the circuit courts declare double-breasting illegal, construction companies have no opportunity to alter their behavior to comply with

the new law. Suddenly, everything they did in the past is open to scrutiny in retrospect because one court in their circuit decided to interpret the labor laws in a new and different way than it had been interpreted for years. Because there is no "effective date" for the new interpretation, the law is changed in retrospect. The result is a violation of the due process clause to the U.S. Constitution. U.S. Const. amend. V.

## CONCLUSION

The Petition should be granted.

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